5-3-2010

[McCleary Record on Appeal, Part 3] 07-2-02323-2-172 Part 3

additional funds, the State will obviously have to be satisfied, if this option is elected, that the district requesting the funding beyond the funds generated by the formula are in fact operating a reasonably efficient program of education for the handicapped students, that the EIPs are properly prepared and formulated, and the district is otherwise making an effort to provide the program requested within the funds generated by the formula.

1.18. There is no constitutional requirement that all costs be recognized in a single formula for funding the handicapped program, and School Funding II Conclusion of Law 6 does not so hold. The Legislature may, but is not Constitutionally required to, fund the handicapped program by means of a single formula. Such conclusion is supported by the "Education for All Act," which requires additional funding to cover the "excess costs" of any handicapped program.

1.19. While the Legislature must act pursuant to the constitutional mandate to discharge its duty, the "means" or the "method" for funding Basic Education for all students, including handicapped students, is for the Legislature to decide unless (1) it can be demonstrated factually, as it was in School Funding II, with respect to the "Block Grants" and here in respect to the "SLD 'E' component" of the formula (including the SLD Severity Factor), that the method used does not "fully fund" the constitutionally-mandated program in every district, or (2) it can be established, as it was in School Funding I, in the case of excess levies, that the "method" or source prescribed or

authorized for funding Basic Education is constitutionally impermissible.

1.20. The handicapped program funding allocation formula contained in LEAP Document 8 Revised, referred to in Engrossed Substitute Senate Bill 4762, Section 505, Chapter 312, Laws of 1986 and, in particular, the SLD "E" component thereof:

(a) Is inconsistent with the requirement of the State Education for All Act, Chapter 28A.13 RCW, that funding for the handicapped program be provided on an excess cost basis; and

(b) Fails to satisfy to some extent the full funding mandate of Article IX, Sections 1 and 2, as determined by this Court in School Funding II that fully sufficient funds be provided and distributed in a manner that is based as close as reasonably practicable on the actual cost of the special educational needs identified in the properly formulated individualized educational programs of all handicapped students pursuant to state law, and sufficient to ensure each school district's ability to comply with all of the rights, procedures, and substantive requirements contained in the special education laws.

1.21. Assuming petitioner had continued to pursue a claim for damages, there is insufficient evidence to award any damages.

1.22. There has been some underfunding to a certain extent of the program that is required under the Education for All Act. Districts, apparently, have been using some excess levy money in an attempt to provide appropriate programs for students

qualifying for such programs. However, on the basis of the record, the Court would be unable to determine the full extent of any underfunding, the full extent of any excess levy money, because of the commingling of the funds at the local level.

DATED this ____ day of _____ 1988.

ROBERT J. DORAN

JUDGE ROBERT J. DORAN
Thurston County Superior Court

Findings of Fact and Conclusions of Law Approved for Presentation by:

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BULKY SUB

CASE# 07-2-02323-2
SEA

SEGMENT 2 OF 2

EXHIBIT 3

SUPERIOR COURT OF WASHINGTON
IN AND FOR THURSTON COUNTY

SCHOOL DISTRICTS' ALLIANCE FOR ADEQUATE FUNDING OF SPECIAL EDUCATION, et al.,

Plaintiffs,

v.

STATE OF WASHINGTON, et al.

Defendants.

NO. 04-2-02000-7

COURT'S OPINION

Plaintiffs seek a judgment from this court declaring that the State's funding of special education in Washington violates the Washington Constitution, article IX, section 1, which declares that:

> It is the paramount duty of the state to make ample provision for the education of all children residing within its borders, without distinction or preference on account of race, color, caste, or sex.

No remedy other than a declaratory judgment is sought, so the acts of the State, acting through the legislature and the Office of Superintendent of Public Instruction, that are subject to scrutiny are those acts that reflect the State's current funding approach. The last complete school year when most preparation of this case occurred was sy2005-6. What occurred before may have historical relevance, but is not what is judged here.

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Plaintiffs have summarized their claims in seven parts,[1] the first, overarching claim contends that the legislature has underfunded support for special education to such a degree that it has failed its paramount duty under article IX, section 1, to make ample provision for education. Hereafter I refer to this overarching claim as the funding formula claim. Plaintiffs contend that the funding formula deficit is so large that proof of the existence of the deficit, without more, is proof that the funding formula is unconstitutional. Following the funding formula claim are five subclaims and a request for retained jurisdiction. I designate the five as subclaims because each challenges the constitutionality of a discrete part of the State's approach for special education funding.

The litigants and counsel are very familiar with the background discussed here, but since this case has engendered public interest, a very basic explanation of the process for school funding may be helpful.

The legislature's approach to school funding is fairly described as a formula that calculates the cost of educating a student through the application of uniform statewide ratios of students to staff and the state average costs of staff. The product is a basic education allocation (BEA) for each student that, after adjustments unique to each district, is paid to a district for each FTE student[2]

[1] Synopsis of plaintiffs' claims
1. The State has been underfunding special education programs over the last four years in at least the following amounts:
2002-03 $101,977,191
2003-04 $108,908,593
2004-05 $134,133,659
2005-06 At least $117,000,000 for those school districts applying for Safety Net funding
2. Safety Net is unconstitutional in that it does not provide a sufficient means of access for all school districts' full demonstration of need.
3. The 12.7% cap on excess cost funding is unconstitutional without a Safety Net that allows school districts to recover their legitimate demonstration of need.
4. The State cannot categorically refuse to fund the indirect costs of special education programs. The State cannot artificially limit Safety Net demonstration of need based on a lower indirect rate.
5. The State cannot categorically refuse to fund necessary special education supplemental contracts.
6. The State cannot divert federal funds to pay for state obligations for salary increases, as federal funds are no more dependable and reliable than local levy funding.
7. This Court should retain jurisdiction to satisfy itself that the Legislature takes reasonably prompt action to correct features of the funding system that the Court has found to be unconstitutional.

[2] An average full-time equivalent student. RCW 28A.150.260.

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enrolled in the district. The choices and responsibility for educating are left to the local districts through Individualized Education Programs (IEPs), subject to statewide minimum standards imposed by the legislature pursuant to its constitutional duty in article IX, section 2, to provide a "general and uniform" educational system in Washington.[3] The BEA is the same for all students in a district, regardless of grade, gender, or skill at learning. It is based on the average cost of educating an average student. RCW 28A.150.260.

The funding formula is expanded for special education students. As with the BEA, a district receives revenue calculated as a per capita allocation for each special education student in the district.[4] This special education allocation is the amount required in excess of the BEA to provide a basic education to a student with a disability. Like the BEA, this excess cost allocation is based on an average cost – it is the additional cost of educating an average special education student, with average disabilities, in excess of the BEA for that student. Since 1995, the legislature has allocated this excess cost on a formula of 0.9309 times the BEA.

This formulaic approach has never been approved by our Supreme Court. Cf, *Brown v. State*, 155 Wn.2d 254, 261, 119 P.3d 341(2005) ("But this court has never held, nor do we now hold, that the Basic Education Act defines the scope of the State's paramount constitutional duty to provide education.") A formulaic approach for special education was approved generally in *School Funding III*[5] by Judge Doran.

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[3] And also subject to an extensive set of federal regulations imposed on the states as a condition of federal funding for education. Federal funding for Washington is annually around $200 million. OSPI has promulgated rules that mostly mirror federal regulations.

[4] Special education population is counted differently; it is a headcount of all students receiving special education services in the district, without conversion to full-time equivalency. A special education student is, "Any student, enrolled in school or not, (i) who has been identified as having a disability, (ii) whose disability adversely affects the student's educational performance, and (iii) whose unique needs cannot be addressed exclusively through the education in general education classes with or without individual accommodations and is determined to be eligible for special education services; . . ." WAC 392-172-035(2).

[5] Three school funding cases were decided in this Superior Court by Judge Robert Doran between 1977 and 1988. Only the first case was appealed to an appellate court; it is reported as *Seattle School Dist. No. 1 v. State*, 90 Wn.2d 476, 458 P.2d 71 (1978). The second and third cases are *Seattle School Dist. v. State*, Thurston County Cause No. 81-2-01713-1 (1983), and *Washington State Special Education Coalition*, Thurston County Cause No. 85-2-00543-8 (1988).

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A special education student is first and foremost a basic education student all during the school day. Thus, a district must expend all of the BEA and all of the excess cost allocation received for its special education students before the district can contend that the legislature has underfunded its special education program. Because both the BEA and the excess cost formulas are based on average costs and average students (and for the excess cost formula, average disabilities), a district with a large special education population will be able to educate a significant number of its special education students for less than the combined BEA and excess cost allocations, and of course the opposite is true for students who need more than average services; state funding is based on averages.

The standards for Judicial Review

The process for judicial review in a constitutional challenge to a legislative act begins with an understanding of the power and duty of the court as provided in the Washington Constitution and the separation of powers doctrine.

> The ultimate power to interpret, construe and enforce the constitution of this State belongs to the judiciary. .

Seattle School Dist. No. 1 v. State, 90 Wn.2d 476, 496, 458 P.2d 71 (1978).

> Nevertheless, we are sensitive to the fact that our state government is divided into legislative, executive and judicial branches with the sovereign powers allocated among the co-equal branches. We are equally aware that those charged with the exercise of power in one branch must not encroach upon power exercisable by another. But, the compartments of government are not rigid. In fact, the practicalities of government require that each branch take into account the power of the others. None was intended to operate with absolute independence.

Id. at 505-506

Even within the separation of powers doctrine, a court cannot abdicate its duty to interpret, construe, and enforce the constitution, and where the constitution has been violated a court must act

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Throughout this trial the parties have referred to these three cases as *Doran I, Doran II, and Doran III*. However, the Supreme Court and Judge Doran himself referred to the cases as *School Funding I, School Funding II, and School Funding III*. The latter references are used in this opinion.

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to enforce the constitution regardless of the views of a co-equal branch of government. *Id.* at 508. Nevertheless, the hallmark of judicial review of legislative acts is caution. A court must not encroach upon the legislature's exclusive power to legislate and thereby violate separation of powers in the guise of constitutional review. This hallmark of caution finds expression in several doctrines well engrained in our law:

- A court should conduct constitutional review of legislative acts with deference to the role of the legislature in the separation of powers doctrine, and in the unique role of the legislature in crafting law, a role totally foreign to the traditional role of courts.

In specific area of article IX legislation, the Supreme Court has declared:

> This court will not micromanage education and will give great deference to the acts of the legislature.

Brown v. State, 155 Wn.2d 254, 261, 119 P.3d 341(2005). Great deference means great caution, but it does not mean that constitutional review of article IX is less precise or less important.

- A court should "presume" that an act of the legislature is constitutional.

Presumptions in the law normally apply to facts, not the law; and constitutional review is a matter of law. Here the presumption is that the legislature is well aware of its responsibility to craft legislation that is constitutional, has intended to do so, and believes that it has.

- A court should overturn a legislative act only if the court concludes beyond a reasonable doubt that the act is unconstitutional.

A conclusion beyond a reasonable doubt may be reached after consideration of the deference and presumption discussed above; but if that quantum of assurance is reached, a court may not fail to declare the act unconstitutional.

I have been guided by these principles in deciding this case.

Throughout this trial, the litigants disagreed on the standard of review that this court must apply. Plaintiffs contend that the preponderance standard should apply to my decision making, relying on a passage from *Seattle School Dist. No. 1 of King County v. State*, 90 Wn.2d 476, 528, 458 P.2d 71 (1978). Defendant counters that the standard is proof beyond a reasonable doubt and

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that this standard applies to findings of fact that support a court's analysis of constitutional issues. Neither is entirely correct.

The standard of review in a case where the constitutionality of a statute is challenged is that the burden is on the party challenging the statute to prove its unconstitutionality beyond a reasonable doubt. A recent statement of these well established principles is found in *Island County v. State*, 135 Wn.2d 141, 146-147, 955 P.2d 377 (1998), where the standard of review for constitutional challenges is discussed at length and distinguished from the standard of evidence that requires proof beyond a reasonable doubt in a criminal case.

> The reasonable doubt standard, when used in the context of a criminal proceeding as the standard necessary to convict an accused of a crime, is an evidentiary standard and refers to 'the necessity of reaching a subjective state of certitude of the facts in issue.' *State v. Smith*, 111 Wn.2d 1, 17, 759 P.2d 372 (1988) (Utter, J., dissenting) (quoting *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1072, 25 L.Ed.2d 368 (1970)).
>
> In contrast, the beyond a reasonable doubt standard used when a statute is challenged as unconstitutional refers to the fact that one challenging a statute must, by argument and research, convince the court that there is no reasonable doubt that the statute violates the constitution.

Id. at 147

Constitutional challenges are questions of law. Perusal of a representative sample of appellate decisions addressing constitutional challenges to statutes shows that they seldom involve disputed issues of fact. This is axiomatic for "facial" challenges to the constitutionality of statutes, and it is usually the case for "as applied" challenges.[6] Occasionally an as applied challenge involves findings about disputed facts that must be resolved before the constitutional challenge is addressed. When that is the case, it does not follow that the evidentiary standard for disputed facts changes to conform to the standard of review for the constitutional challenge. The two are apples and oranges; the first involves findings of fact, the latter conclusions of law.

In civil actions there are several recognized burdens of proof, but the paramount evidentiary standard is proof by a preponderance of evidence. For example, in a civil enforcement action

[6] These challenges are often decided on agreed facts or on summary judgment.

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brought by a government agency against an individual for violation of a statute, the evidentiary standard for proving the violation may be proof by a preponderance. If so, a defense asserting that the statute is unconstitutional as applied against the individual does not change the evidentiary burden of proof required for proving violation of the statute. If the government may prove violation of the statute by a preponderance, that burden does not change to proof beyond a reasonable doubt merely because the constitutionality of the statute is challenged. And in a declaratory judgment action brought under RCW 7.24.020 by an individual challenging the validity of a statute on as applied constitutional grounds, issues of fact are tried and determined in the same manner as issues of fact are tried and determined in other civil actions. RCW 7.24.100. The evidentiary standard for contested issues of fact does not change because the declaratory judgment is sought on constitutional grounds rather than some other asserted ground. For contested issues of fact, the evidentiary burden remains proof by a preponderance even though the standard for reviewing the constitutionality of the statute is that the statute is presumed constitutional unless the court is convinced beyond a reasonable doubt that the statute is unconstitutional.

In this case plaintiffs have sought a declaratory judgment that the appropriations of the legislature to fund payment of the special education costs of the districts are unconstitutional on both "facial" and "as applied" grounds. In the as applied challenges there are many disputed factual issues that are material to the questions of law – for example, what number of special education students in the school districts' accounting actually have current, properly formulated IEPs? Proof of this issue must be determined on a preponderance standard; it does not shift to the evidentiary standard of proof beyond a reasonable doubt.

Seattle School Dist. No. 1 of King County v. State, supra, is in accord. The Supreme Court addressed the issue of whether a higher evidentiary standard applied and rejected such a contention.

> Thus, contrary to appellants' contention, the normal civil burden of proof, i.e., preponderance of the evidence, applies.

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Id. at 528. The Supreme Court did not specifically address the standard of review because that issue was not raised. However, at the trial court level, and in all the *School Funding* cases, Judge Doran applied the beyond a reasonable doubt standard for constitutional review.

In this case I have applied the preponderance standard for questions of fact and the beyond a reasonable doubt standard for review of constitutional issues of law.

The "Facial" Constitutional Challenge

The task of a court when deciding a facial challenge – *i.e.*, deciding whether a statute or act of the legislature is unconstitutional on its face, without regard to the manner in which enforcement of the statute or act is attempted – is whether the language of the statute or act violates the constitution. In this exercise, a court interprets and construes ("gives legal meaning to") the language of the constitution, but views the language of the statute or act using the meaning directed by the legislature,[7] or where the legislature is silent, the plain meaning of the language.

In *Tunstall v. Bergeson*, 141 Wn.2d 201, 221, 5 P.3d 691 (2000), the Supreme Court opined:

> [A] facial challenge must be rejected unless there exists *no set of circumstances* in which the statute can constitutionally be applied.

Facial challenges are decided by a two step process, as declared in *Tunstall*, at page 221: First, determine what article IX, section 1 ("the paramount duty to make ample provision [for special education students]") requires; and second, determine whether there is no set of circumstances in which the acts of the legislature could satisfy article IX, section 1.

It is settled law that in fulfilling this broad constitutional duty, the legislature must define basic education and create a basic program of education. *Seattle School Dist. No. 1 v. State*, 90 Wn.2d 476, 482, 458 P.2d 71 (1978). Further, the legislature has the authority to select the means to discharge this duty and the judiciary should restrain its role to providing only broad constitutional guidelines within which the legislature may work. *Seattle School Dist. No. 1*, 90 Wn.2d at 518;

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[7] "[I]n interpreting a statute it is the duty of the court to ascertain and give effect to the intent and purpose of the Legislature, as expressed in the act. The act must be construed as a whole, and effect should be given to all the language used." *Tommy P. v. Board of Commissioners*, 97 Wn.2d 385, 391, 645 P.2d 697 (1982).

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Tunstall, 141 Wn.2d at 223. The legislature has addressed its constitutional duty to make ample provision for special education by enacting chapter 28A.150 RCW, the Basic Education Act, and specifically including chapter 28A.155 RCW and RCW 28A.150.370 and .390, and by making annual appropriations for special education that appear in section 507 of the current General Government Appropriation Act.[8] The plaintiffs do not assert that the codified laws, chapter 28A.155 RCW and RCW 28A.150.370 and .390 are facially unconstitutional; rather they contend that section 507 is facially unconstitutional in both the amount appropriated and the funding formula contained in the conditions and limitations of section 507.[9] In support of these contentions, the plaintiffs assert:

> Accordingly, if there is no set of circumstances where the disputed [sic] statutory provision amply provides for *all* students in special education programs, the Court must find that the funding formula is facially unconstitutional. Since the State's funding formula does not, and cannot, adequately fund all students in all school districts all of the time, Plaintiffs' facial challenges are valid.

Plaintiffs' Supplemental Trial Brief, p. 7. Plaintiffs' argument on the facial unconstitutionality of section 507 seems encapsulated in the following exchange at oral argument:

> The Court: [You seem to contend that] The [12.7 percent] cap is only constitutional if you have a mechanism that eliminates the cap.
>
> Ms Abel: Right. To be able to apply, to show that they have a need. . . . And that was the original intention when they created the Safety Net system, as you heard evidence. There was a mechanism to apply for students that were over the cap.

[8] At trial, Laws of 2005, chapter 518, section 507, was used (Ex. 550, pdf 15); currently it is Laws of 2006, chapter 372, section 507. The sections are the same except that the amount appropriated for FY2007 was increased by about $7 million in the 2006 appropriation act. Over the past 10 years, the appropriation for special education appears in much the same form in each appropriation act. The language of the special education section contains the amount of the appropriation followed by conditions and limitations that have been mainly consistent from one year to the next. This declaratory judgment action pertains only to the law as it currently exists. In discussion of the issues, I have used the 2005 appropriation amount in order to be consistent with the evidence. The conditions and limitations are exactly the same in both appropriation acts. At trial and in this opinion, the special education appropriation and the conditions and limitations are referred to as section 507.

[9] In my research I did not discover any appellate decision that declared an appropriation act (or bill) of the legislature unconstitutional on its face, as distinguished from a codified statute enacted by the legislature. Defendants did not raise this issue, so I have proceeded as if this claim is available to plaintiffs. I have not resolved that question.

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I am not persuaded. Section 507 is not unconstitutional on its face. The test in a facial challenge is whether there is any set of circumstances that permits a conclusion that school districts receive sufficient money from the State to pay the districts' costs of providing a basic education to the districts' special education students. The language of section 507 permits that conclusion. In the language of section 507, there is a limitation (the 12.7 percent cap) and a safety net (with an appropriation for safety net that has not been exhausted). The conditions and limitations in section 507 that address the 12.7 percent cap and the safety net do not create the impediment to access of safety net awards that are the core of plaintiffs' argument on this facial challenge. Subsection (8) of section 507 appropriates approximately $47.5 million for safety net awards and directs the superintendent of public instruction to an additional source if necessary. Subparts (a) and (b) of subsection (8) direct, first, "The committee shall consider unmet needs for districts that can convincingly demonstrate that all legitimate expenditures for special education exceed all available revenues from state funding formulas" and, second, "The committee shall then consider the extraordinary high cost needs of one or more special education students." These provisions do not, on their face, limit districts' access to safety net funds in the manner plaintiffs contended at trial. Those limitations arise from application of the safety net process to the districts' alleged excess need, and should be analyzed under the "as applied" challenge. Subparts (c), (d), and (e) of subsection (8), do potentially restrict safety net awards, but the language of these subparts is not nearly sufficient to convince me beyond a reasonable doubt that they unconstitutionally restrict "ample provision".

Subsection (9) of the conditions and limitations in section 507 delegates to the superintendent of public instruction the power to adopt rules and procedures to administer the safety net process – and the effect of some rules are clearly part of this case. However, delegation of this authority and rules promulgated by the superintendent cannot make the challenged act of the legislature facially unconstitutional.

Finally, the amount appropriated in section 507 is not on its face so deficient that the appropriation is facially unconstitutional. The evidence in this case is that the fund for safety net

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awards was not exhausted. The reason for that occurrence is properly addressed in the as applied challenge, but not in this facial challenge.

The "As Applied" Constitutional Challenges

The Funding Formula Claim

This claim contends that the State has been underfunding special education programs over the last four years in at least the following amounts:

2002-03 $101,977,191
2003-04 $108,908,593
2004-05 $134,133,659
2005-06 At least $117,000,000 for those school districts applying for safety net funding.

Consistent with the evidence offered at trial, I have focused on the last school year with complete records, sy2005-06, where the deficit is alleged to be $134 million. Included in that figure is $21.6 million attributed to the 12.7 percent cap on excess cost allocation. This claim is addressed in a following section and so the $21.6 million can be deducted from the $134 million to give a more accurate picture of the magnitude of deficit claimed here. This remaining portion, $112.4 million in sy2005-06, is directly attributable to plaintiffs' claim that the excess cost allocation is so inadequate that it is a violation of the State's paramount duty to make ample provision for special education.

I conclude that the claimed amount of excess cost funding deficit does not prove that the legislature's allocation for special education is unconstitutional. For each special education student under the 12.7 percent cap, the State pays a district an excess cost allocation equal to 0.9309 of the BEA. This is in addition to the full BEA for that student. Except for the cap, plaintiffs acknowledge that this excess cost formula is consistent with national data that fixes the cost of educating a special education student at approximately 190 percent of the cost of educating a basic education student. It is also consistent with the opinion of plaintiffs' expert, Dr. Parrish, whose study, according to plaintiffs, "found that nationwide the total excess expenditures for special education in addition to basic education expenditures were about 90% of total basic education expenditures." *Plaintiffs' Proposed Findings of Fact*, No. 207. Nevertheless, plaintiffs argue that

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special education is grossly under funded and rely upon the opinion of Dr. Parrish and statewide accountings of special education expenditures for proof of that contention. Plaintiffs explain that the State's formula is constitutionally deficient because the 0.9309 multiplier is applied against the BEA, not the expenditures for basic education. Plaintiffs also argue that the required cost accounting methodology proves their claim by showing such a large deficit of the excess cost allocation compared to special education costs that the deficit itself is sufficient to prove that the appropriation is constitutionally deficient. I am not persuaded.

The 0.9309 multiplier is not an unconstitutional application of the ample provision requirement of article IX, section 1. There is persuasive evidence that the legislature acted rationally in establishing this multiplier. The legislature had before it the 1995 *Special Education Fiscal Study*, Exhibit 92, pdf 21, that reported a 0.87 multiplier for Washington education. Further, as noted above, the multiplier is consistent with national standards, and evidence has shown that it has remained relatively constant over time.[10] At the end of the trial, it seems evident that the alleged shortfall in the special education appropriation, if it is found to exist at all, is the product of an inadequate BEA, not an inadequate excess cost multiplier. The adequacy of the BEA is not an issue before this court. I have read reports that other cases in other courts are addressing the constitutionality of basic education funding, but that issue is not here.[11]

Plaintiffs argue that Dr. Parrish's study, and others, applied a multiplier to the actual costs of basic education, while the 0.9309 multiplier in this state has been applied to the BEA, a revenue rather than a cost allocation. I am not persuaded that there is a difference; the BEA is required by law to be the cost of basic education ("fully funded", RCW 28A.150.250), and that issue is not before this court.

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[10] Plaintiffs argue that the 0.9309 multiplier not a rational legislative choice, but rather is a "construct" selected by the legislature to comply with the federal requirement of "maintenance of effort". Carried to the last 9/10,000 of the formula, that may be so. Still, that does not detract from the rationality of the number for all the reasons identified here.

[11] Plaintiffs' proposed findings of fact numbered 226 and 227 address this matter indirectly, but the evidence referred to is peripheral to the issues here and falls well short of that required for constitutional review of basic education funding.

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Plaintiffs have not shown the funding deficit for special education that they claim. They rely upon the F196 reports of all districts statewide submitted annually to OSPI. These voluminous reports, provided here in Exhibit 501, include an accounting of special education expenditures from Program 21 (Special Ed – Supplemental, State) and Program 24 (Special Ed – Supplemental, Federal). The reports also include an accounting of revenue received by the district, including the BEA, the excess cost allocation, federal IDEA revenue, federal Medicaid reimbursement revenue, and often a small amount received from other districts for transfer students. Plaintiffs compiled these statewide reports of special education expenditures and revenue in Exhibit 131a, totaled expenditures and revenues, and concluded that the deficits reported above are the result.

This evidence does not prove the contention that special education is underfunded at a level anywhere near the magnitude claimed. Plaintiffs have not accounted for all the revenue available to pay the cost of educating special education students. While F196 reports include all of the revenue sources identified above, including the BEA, plaintiffs did not include the BEA in Exhibit 131a. For example, the $134 million deficit shown by the totals for sy2005-06 in Exhibit 131a includes a $1,305,776 deficit for Bellingham School District. In the accounting for that district, $8,339,487 is stated as the cost of special education, and is the sum of Program 21 and 24 costs shown in Bellingham's F196. $7,033,711 is stated as the revenue to pay those costs, and is the sum of four of the five revenue sources listed above, but not including BEA. In Exhibit 131a, plaintiffs have not accounted for any part of the $5.4 million BEA received that year by Bellingham School District for its 1,279 special education students,[12] or for any other school district.

Plaintiffs do contend that the BEA for special education students is used to pay the costs of basic education in the district, including some of the costs for special education students. They offer the State's 1077 methodology as proof of their contention. Plaintiffs misconstrue the law and fail to prove the factual underpinnings of their contention that the 1077 methodology accounts for all special education students' BEA in basic education services.

[12] The example of Bellingham School District was explored in the cross examination of Dr. Dale Kinsley, superintendent of that district.

The 1077 report is an annual report required by the federal government to show the allocation between basic and special education services by school districts receiving IDEA special education supplemental funds (State Program 24). The State has used the report to develop its 1077 methodology for the purpose of providing uniform statewide allocation of basic education support for special education services. The methodology includes two key assumptions relevant to this issue:

- Special education students receive their appropriate share of basic education support from basic education staff when served in the regular classroom.
- When special education students are served outside the regular classroom, basic education dollars follow them to partially support special education services they receive.

Exhibit 4, pdf 167. These assumptions are consistent with the law, as provided in Section 507(2)(a):

> The superintendent of public instruction shall use the excess cost methodology developed and implemented for the 2001-02 school year using the S-275 personnel reporting system and all related accounting requirements to ensure that:
> (i) Special education students are basic education students first;
> (ii) As a class, special education students are entitled to the full basic education allocation; and
> (iii) Special education students are basic education students for the entire school day.

Exhibit 86.

The 1077 methodology is solely for allocation of costs; it does not allocate revenue or identify sources of revenue. Its primary purpose is to uniformly identify special education costs in the districts' F196 reports. (It is also for use in preparing safety net applications, but in recent past that has been limited to high cost individual students.) The 1077 worksheet is a series of reasonably complex calculations that allocates the cost of a special education teacher whose duties are part basic education and part special education. In the examples offered at trial, the average (rounded off) allocation of cost was 38 percent to basic education and 62 percent to special education. The 38 percent allocated to basic education costs is significantly less than the percentage of state support for a special education student that is BEA. And when a special education student moves out of the basic education classroom, by law the BEA follows that student and is applied to special education

costs. The 1077 methodology does not prove that school districts expend all BEA for special education students in the basic education classrooms. The 1077 methodology does not prove that BEA can be omitted from the calculation of alleged funding formula deficit.

Plaintiffs also attempted to show even larger funding formula deficits using first, the opinion of Dr. Thomas Parrish and second, a formula that applies the 0.9309 multiplier to the average per pupil expenditures (APPE) calculated by OSPI.[13] Dr. Parrish's conclusions concerning the need to change staffing ratios for special education were not persuasive. The APPE is a federally directed calculation of expenditures that includes more than basic education. It includes costs for supplemental contracts, class size reductions, local choice programs, and undefined extracurricular activities. The APPE calculation brings me full circle to the point first made in this section: that it seems evident that the alleged deficit in the special education appropriation, if it exists, is the product of an inadequate BEA, not an inadequate excess cost multiplier. As before, adequacy of the BEA is not an issue before this court.

Plaintiffs' contention addressed in this section of the court's opinion, that the funding formula deficit is so large that the deficit itself is evidence of constitutionally inadequate funding, seeks in essence to decouple special education funding from BEA funding. This coupling[14] of the excess cost allocation to the BEA allocation is a basic feature of the legislature's funding approach; and the coupler, the 0.9039 multiplier, is acknowledged as a reasonable approach supported by

[13] Just as plaintiffs assert more than one basis for their claim, the State's challenge to plaintiffs' accounting of revenue is not the only defense asserted against the funding formula claim. A substantial defense was offered by Dr. Douglas Gill, State Director of the Special Education Section of OSPI, in his testimony and Exhibit 722. In testimony and the exhibit, Dr. Gill identified 7 broad categories where he contends plaintiffs improperly account for expenditures or fail to account for revenue; and he assigns a dollar amount to each. In each of the three school years addressed by plaintiffs where records are complete, Dr Gill's dollar totals exceed the amount of deficit claimed by plaintiffs. For example, in sy2005-06, where plaintiffs claim a deficit of $134 million (or $112.5 million excluding the cap impact), Dr Gill identifies $310.6 million to offset that claim. Four of the largest categories identified by Dr. Gill, "2(c) Undeclared Revenue Acct 7121," "5 State Levy Equalization Funding," "6 Inconsistent Indirect Cost Calculation," and "7 Over ID of Sp. Ed. Students by 15%," comprise $217 million of his total. I was not persuaded by the evidence on these categories; nevertheless, the remaining amounts for the other categories raise significant issues about plaintiffs' claim. I have not addressed this defense in detail because it was not necessary to my decision.

[14] In his testimony, Dr. Gill of OSPI spoke of the legislature's changes to funding in 1995 as "decoupling". Dr. Gill's decoupling was of a different relationship than is discussed here.

national experience and expert opinion. However, because the BEA is so inadequate in plaintiffs' view, they ask this court to decouple the multiplier from the BEA allocation and instead couple it to a school district's expenditures for its special education students. This would create a funding approach to special education independent of the funding approach to basic education and would permit me to consider the legislature's funding of special education separate and apart from basic education funding.

Such a course is permitted only if I conclude beyond a reasonable doubt that the coupled funding approach is unconstitutional. I cannot reach that conclusion. As developed above, the legislature's approach of using the multiplier to couple special education funding to BEA funding is rational.[15] Of the two principal variables in this approach, the BEA allocation and the multiplier, only the adequacy of the multiplier is part of this case – and plaintiffs have not proved it inadequate. There is no basis here for me to declare the legislature's approach unconstitutional. To do so would be an unwarranted usurpation of the legislature's prerogatives in the field of education. *Brown v. State*, 155 Wn.2d 254, 261, 119 P.3d 341 (2005) ("This court will not micromanage education and will give great deference to the acts of the legislature.")

Application and History of Safety Net

Parts two and three of plaintiff's claims address the safety net in special education funding. Before deciding those issues, I here address the safety net generally, as it currently exists and as it has existed in the past.

[15] Indeed, the finance subcommittee report of the K-12 Advisory Committee of Washington Learns recommended, "Students eligible for special education services should be allocated additional funding; the formula should continue to be a derivative of Basic Education Funding." Exhibit 69, pdf 20. Mike Merlino, a member of the finance subcommittee, testified to various tweaks recommended in the report that would increase the amount of the BEA allocation to which the 0.9309 multiplier would be applied. The tweaks were mainly recognized enhancements to the BEA allocation. While the inclusion of these enhancements would be significant (about $40 million) and may be wise, they do not rise to the level of constitutional significance. To declare that the legislature's present approach is unconstitutional because of failure to include the enhancements in its current funding formula is precisely the type of micromanagement cautioned against in *Brown v. State*, *Id.* at 261.

Counsel often referred to Judge Doran's decision in *School Funding III* on the issue of safety net. As noted earlier, *School Funding III* does not have preclusive effect. Nevertheless, in his closing, Mr. Bjorkman urged the court to:

> Remember in *Doran III*, the judge said, if you are going to fund based on averages, you have to have a system in place where a district can go get more money. The state set up a system to allow districts to do that.

I conclude that *School Funding III* does not support such a broad characterization of the State's obligation to provide a safety net. *School Funding III* addressed the use of averaged populations of special education students to determine the levels of special education support from the State. Judge Doran concluded that a safety net was necessary for that plan. The current excess cost methodology depends on average costs, not average population. Further, I find that the State has never had a safety net program of broad application; rather it has had an inconsistent history of narrowly focused safety nets.

In *School Funding III*, the court considered a special education funding plan that awarded excess cost allocations to districts based on a presumed average population of special education students in four specific learning disability (SLD) categories, A-B-C-D. Excess cost allocation for a fifth SLD, category E (the least disabled students), was paid on a per capita basis up to four percent of the district's total population of students. Above this four percent cap, the State provided reduced allocations for "E" students on a diminishing scale.

Judge Doran decided the SLD-E category case apart from the other categories, and declared that its four percent cap and sliding scale of allocation violated ("is inconsistent with") the State Education for All Act, chapter 28A.13 RCW. He also declared, somewhat enigmatically, that it "Fails to satisfy to some extent the full funding mandate of Article IX, Sections 1 and 2, . . ." *Conclusion of Law 1.20*. In regard to safety net for SLD-E, he said nothing at all.

The complaint of *School Funding III* plaintiffs about the other four categories of SLD was that allocation was based on average populations of special education students. If a district had more students in a category than the average permitted, the district got no excess cost allocation for those students. In *School Funding III*, this was called the A-B-C-D formula. Judge Doran did not

declare that formula unconstitutional. Instead he opined that the legislature could use the formula if it had a safety net. His conclusions, including his view of deference to the legislature, are provided here:

> 1.14. There is no perfect formula and the formula must necessarily evolve and undergo change in order to reflect changing public policy and factual patterns. No formula or element of the formula should be set in constitutional concrete as long as the formula selected and the public policy determined provides fully sufficient funds to districts which permit districts then to offer handicapped students, who are eligible for the program, the education that is constitutionally required.
>
> 1.15. Whether the State devises another formula or restructures the A-B-C-D formula is for the Legislature to decide.
>
> 1.16. However, if the present formula is to continue as the basis for the allocation of funds for the handicapped programs, provision would have to be made for the districts that can establish their programs of special education are underfunded to obtain the additional or supplemental funds necessary to provide the constitutionally-mandated program of education for their handicapped students.
>
> . . .
>
> 1.18. There is no constitutional requirement that all costs be recognized in a single formula for funding the handicapped program, and School Funding II Conclusion of Law 6 does not so hold. The Legislature may, but is not Constitutionally required to, fund the handicapped program by means of a single formula. . . .

The limitation of the A-B-C-D formula in *School Funding III* is similar to the 12.7 percent cap in this case because both categorically exclude some special education students from excess cost allocation if a population ceiling is exceeded; but it has no direct relationship to plaintiffs' claim that there must be safety net access to protect from a funding formula deficit. *School Funding III* is not binding precedent, but even if it was, it would not compel a safety net on what plaintiffs characterize as "their demonstrated unmet need"[16] – i.e., the funding formula issue.

After *School Funding III* was decided in 1988, the legislature did not create a safety net until 1995. At some point not made clear by this record, the legislature scrapped the A-B-C-D formula and instituted an approach that provided special education funding for all special education students. In 1995, the legislature overhauled the system and instituted the methodology that is before the

[16] *Plaintiffs' Supp'l Trial Brief*, p 10.

court today. Since 1995, safety net has had a limited but still discernable role in excess cost funding.

The overhaul of the special education funding plan reflected, in significant part, the legislature's intention to connect the growth in cost of special education more closely to the growth in cost of basic education. A key to accomplishing that goal was to control growth in special education by capping excess cost allocations at 12.7 percent of the basic education population. The cap was phased in gradually, in part because of the federal restriction against using federal funds to supplant state funds. A safety net category, called MOESR (maintenance of effort – state revenue) was created for sy1995-96, and as shown below in Exhibit 710, paid out safety net awards in decreasing amounts over the seven year phase-in of the 12.7 percent cap. In 1995 there was an additional category, Special Characteristics, that morphed into the Percentage and Demographics categories for sy1997-98. Demographics was a category to relieve school districts that attract special education students because of the high quality of medical and social services available to the disabled in the area encompassed by the district. Spokane is an example of such a district. Beginning in sy2000-01, the legislature eliminated the funding for the Demographics category.

High Cost Individual Students (HCI) has been a safety net category from the beginning. It is available only after costs exceed a minimum established by the State. Until sy2005-06, the State minimum has been the same as (or exceeded) the federal minimum for a concurrent federal safety net program. Accordingly, federal funds have been used exclusively to pay those needs until last year when the federal minimum was raised to about $21,000, while the state minimum remained at about $15,000.

Although MOESR was designed to soften the blow of the 12.7 percent cap, the Percentage category was intended to directly address the impact of the cap on school districts whose special education population exceeded the cap. Within a few years of applying the Demographics category, it became evident that this category was serving the same need as Percentage. Demographics was eliminated, and by sy2001-02, Percentage safety net awards totaled approximately $5.4 million. For sy2002-03, Percentage was essentially eliminated by the legislature's decision to withhold funding

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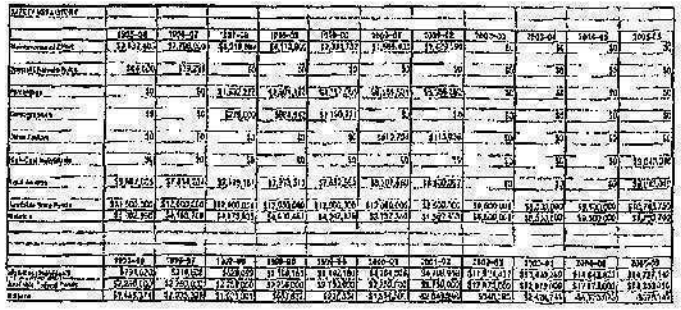
for that category. Since sy2001-02, the State has not awarded any money for safety net, except the past year for HCI. Although Exhibit 710 shows appropriations of $8.5 million for safety net after sy2001-02, that appropriation was for HCI only.

Exhibit 710 shows the history of safety net categories and awards.



The 12.7 Percent Cap

I conclude that the cap in Section 507 that denies payment of excess cost allocation for that portion of a school district's special education population over 12.7 percent of the district's FTE student population is unconstitutional as applied because there is no safety net or other alternative that permits affected school districts to seek redress from the limitations of the cap. In the manner in which the cap is currently applied, it violates the State's duty to make ample provision for the education of all special education students, as required by article IX, section 1 of the constitution. As a result of application of the cap in sy2005-06, excess cost allocation was denied to school districts for 5,464 special education students, and the districts affected experienced a loss of $21.6 million of excess cost allocation.

Conversely, I conclude that a cap on the population eligible for excess cost allocation is constitutional if (1) the cap is imposed for a rational legislative purpose, (2) the level of the cap has

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been established rationally, and (3) there is a safety net process that permits a school district the opportunity to show that without additional allocation its special education program cannot be fully funded. The 12.7 percent cap in Section 507 passes the first two tests, but as presently applied, fails the third.

The 12.7 percent cap was created as a way to control the growth of special education population as a percentage of total student population by compelling school districts to confront over-identification of special education students. The cap was a rational choice by the legislature to meet a significant problem. When the cap was created in 1995, special education population was growing at a rate of 10 percent per year, or about twice as fast as the basic education population. It was growing about twice as fast as the revenue limitations of I-601 would permit. The legislature had before it three studies, Exhibits 92, 93, and 94, that each concluded the then current approach encouraged over-identification of special education students. Setting 12.7 percent as the level for imposition of the cap was also a rational choice. It was, and is today, supported by similar percentages nation wide, and at the time of enactment the 12.7 percent level was higher than the percentage of special education population in Washington.

The State's funding formula approach to special education funding (the excess cost methodology) is rational (and constitutional) because while it is based on average services and costs, those averages are computed on a whole spectrum of disabilities and needs. For each eligible special education student, a school district receives an average basic education allocation and an average excess cost allocation based upon the 0.9309 multiplier. Some students will be educated for less, some will cost more, but the theory of the funding formula approach is that the cost of each student will be funded. This applies whether the special education population of the district is 10 percent or 15 percent; the funding for the district is based on a per capita amount for each eligible student. A cap without a safety net changes that. It assures that districts whose special education population exceed 12.7 percent will not receive any excess cost allocation for those students above the cap. As noted above, the funding formula approach is based on averages that provide the same excess cost allocation whether the cost of educating the student is above or below average.

However, no evidence is this case suggests that the cost of educating a special education student above the cap is averaged into the allocation paid for students below the cap -- and neither party contended that it was. Accordingly, it is clear that while the State's funding formula approach can amply provide for a special education student even if the costs of educating that student exceed 1.9309 times BEA, the same formula does not amply provide for a student above the cap who is simply excluded from the funding formula.

A safety net is not the only approach to addressing the constitutional imperative to provide for students above the cap. It is addressed here because it was the solution originally implemented by the legislature when the cap was created, before it was eliminated by lack of funding in sy2002-03.

A cap with a safety net permits a school district to seek the excess cost allocation for its students over the cap, but gives the State the opportunity to analyze the district's entire special education program, to assure before payment of safety net funds that the district's special education students are eligible and have current, properly formulated IEPs, that the district is accessing all available revenue, and that it is operating a reasonably efficient special education program. Such close scrutiny for every district every year would not be practical, so a cap with a safety net is a very rational alternative; it addresses the State's interest in preventing over-identification of special education students by permitting close scrutiny of districts that exceed the cap, while at the same time providing ample funding for all eligible special education students.

Application of the Safety Net to the Funding Formula Deficit

In part two of their Summary of Claims,[17] plaintiffs contend:

> Safety Net is unconstitutional in that it does not provide a sufficient means of access for all school districts' full demonstration of need.

As explained in their *Supplemental Trial Brief*, p 9-10, plaintiffs' argument has two parts: first, the safety net is inadequate because it does not address the gap "between overall demonstrated need" and State funding; and second, safety net funding of any kind is unconstitutional because it is

[17] Plaintiffs' Closing Argument Rebuttal, p 5.

not sufficiently dependable and regular to serve as an adequate funding source, citing *Seattle School Dist. No. 1 v. State*, 90 Wn.2d 476, 524-27, 458 P.2d 71 (1978). The apparent inconsistency in these two parts is difficult to address, so I will not try. I reject the second part and will address the first.

I reject the second part because the case cited by plaintiffs does not make dependable and regular funding a constitutional requirement. Rather, *Seattle School Dist.* required that revenue for schools come from a dependable and regular tax source. The court rejected special levies as a taxing source, *Seattle School Dist.*, 90 Wn.2d at 526. Dependable and regular funding by the legislature has never been a constitutional test.

As regards the first part, I am not persuaded that safety net must be part of the State's constitutional duty of ample provision for special education, and therefore am not persuaded that inadequate access to safety net revenue violates the constitution. This claim is denied. Safety net is not any part of a constitutionally mandated duty of the legislature, it is a tool available to the legislature to use as it chooses. It is a tool that may in some instances be used by the legislature to save a feature of its education funding program that might otherwise violate the constitution – for example, a feature that caps the number students for whom excess cost allocation will be paid and categorically excludes those over the cap, as in this case with the 12.7 percent cap, or in *School Funding III*, with the A-B-C-D formula. In constitutional review of an education funding approach, a court may consider the legislature's choice to include a safety net when determining whether the funding approach satisfies the constitution; but a court cannot declare that the legislature's decision to forgo safety net unconstitutional. Courts must defer decisions about the details of a funding approach to the legislature; courts must avoid micromanaging policies that are clearly the province of the legislature. In addressing the constitutionality of the 12.7 percent cap, I declared that feature of the legislature's approach unconstitutional. I further opined that the safety net for that feature, authorized in section 507 but unfunded, could save the cap. I did not declare that the legislature must have a safety net for the cap. Such a declaration is beyond my power, it is a decision for the legislature. Here , in the second part of the safety net claim, plaintiffs contend that safety net is

underfunded and too restrictive to meet the districts' demonstrated unmet need. That is an issue to defer to the legislature. My judicial responsibility is to consider the funding approach as implemented by the legislature and to consider whether the approach is so inadequate that it violates article IX, section 1. I have done that in the Funding Formula section of this opinion and declared against the plaintiffs.

Indirect Costs

This claim fails for lack of proof. All school district indirect expenditures are accounted for in Program 97 of the State's program of accounting for expenditures and revenue. Program 97 includes all indirect costs. It does not matter which program generates the cost, it can be basic education, special education, or any other program operated by a school district. The school districts report Program 97 expenditures on their annual F196 reports, but do not allocate these indirect expenditures to the programs that generate them. The State pays most of these costs, and no attempt is made to break out the payments into allocation among basic education, special education or other programs. For example, the Lake Washington School District F196 report for sy2004-05 shows Program 97 expenditures of $20,084,105. In the accounting of Program 97 revenue for these costs, state revenue paid $15,106,206, federal revenue paid $152,860, and the balance of $4,824,968 was paid by other resources, which witnesses identified as local levy money. Plaintiffs contend they should receive additional excess cost allocation to pay for special education related indirect expenditures, but at trial no attempt was made to show how reported Program 97 expenditures should be broken out. In the Lake Washington School District example, about 24% of indirect expenditures were paid for by local levy money, but it is impossible to determine what proportion of this money was used to pay special education related indirect expenditures, if any. Exhibit 50, pdf 49.

In the safety net applications for districts with high cost individual students (HCI safety net category), the demonstration of need application permits a school district to show indirect costs of approximately 4% in making application for additional safety net excess cost allocation. This is reasonable because Program 97 expenditures and payments are not otherwise reflected in the

application. The fact that additional indirect costs can be included in a safety net application does not prove that State payment of Program 97 indirect expenditures is constitutionally inadequate.

Plaintiffs also contend that the 4% indirect cost rate permitted by the State for safety net applications should be higher. They point to the 16.7% rate for indirect expenditures that school districts are permitted to deduct from the reimbursement they must make to the State for unspent federal IDEA funds. The basis for this difference is not explained in the evidence; but in any event, judicially compelled higher rates would be a micromanaging education. *Brown v. State*, 155 Wn.2d 254, 261, 119 P.3d 341 (2005) ("This court will not micromanage education and will give great deference to the acts of the legislature.")

Supplemental Contracts

Plaintiffs contend that it is unconstitutional to exclude supplemental contracts from the State's obligation to fund basic education for special education students. The prohibition against State payment of supplemental contracts is not limited to special education, it encompasses all basic education. RCW 28A.400.200(4) provides, in relevant part:

> Salaries and benefits for certificated instructional staff may exceed the limitations in subsection (3) of this section only by separate contract for additional time, additional responsibilities, or incentives. Supplemental contracts shall not cause the state to incur any present or future funding obligation.

This statute directs that supplemental contracts cannot be part of the State's funding obligation, and so by implication they are not part of basic education. Although the proposition is not stated directly, plaintiffs contend that the statute is unconstitutional, at least for special education. At trial they demonstrated that most special education programs offer supplemental contracts and TRI pay in order to attract and retain special education teachers and administrators, but plaintiffs did not show why such contracts and extra pay are a component of basic education.

Basic education is not specifically defined in the Basic Education Act, instead the legislature has enacted a set of goals and declared that the purpose of the Act, "shall be to provide opportunities for all students to develop the knowledge and skills essential to" accomplish those goals. RCW 28A.150.210. The Act is a plan to provide administration and revenue to accomplish

the goals, with the actual delivery of services left to local school boards. The focus of the Act is clearly on students and the services necessary to educate them.

In addition to the Basic Education Act, the legislature has enacted a myriad of other education related laws. The authority to enact these additional education laws falls within the general power and constraints granted the legislature in the constitution, but they are not governed by article IX, section 1. The provision for supplemental contracts, including TRI pay, is such a law. It is included in chapter 28A.400 RCW, which addresses education employees. Given the invaluable service they provide, the level of pay for teachers and staff and the manner in which they are paid are matters of great concern for citizens and the legislature. Nevertheless, those issues are not part of an article IX, section 1, analysis. There is no basis here for declaring RCW 28A.400.200(4) unconstitutional.

Federal IDEA Funds Diversion

In this part, plaintiffs contend:

> The State cannot divert federal funds to pay for state obligations for salary increases, as federal funds are no more dependable and reliable than local levy funding.

Plaintiffs' Closing Argument Rebuttal, p 5. The only evidence of this issue offered at trial was the cryptic testimony of Dr. Brian Benzel, superintendent of the Spokane School District, who testified that the district's excess cost allocation for sy2004-05 was reduced by $127.35 per student because federal IDEA funds were used to offset teacher salary and benefit increases, thereby reducing the BEA and consequently the excess cost allocation. No explanation of why this occurred was offered, except a single short paragraph in the State's *Administrative Budgeting and Reporting Handbook* . . ., Exhibit 4, pdf 79, where it is noted, "The Legislature assumes that the districts will obtain funding for these increases from the district's increase in IDEA funding for 2004-05. This integration will not impact the amount of IDEA funding received by a district." This evidence is wholly inadequate to prove violation of the constitution beyond a reasonable doubt.

Retained Jurisdiction

I decline to retain jurisdiction in this case.

[A] trial court's decision to retain jurisdiction is inconsistent with the assumption that the Legislature will comply with the [court's] judgment and its constitutional duties.

Seattle School Dist. No. 1 v. State, 90 Wn.2d 476, 538, 458 P.2d 71 (1978)

Dated March 1, 2007

Thomas McPhee, Judge

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☐ EXPEDITE
☐ No Hearing is Set
☑ Hearing is Set:
Date: April 10, 2007
Time: 1:30 p.m.
Judge Wm. Thomas McPhee

STATE OF WASHINGTON
THURSTON COUNTY SUPERIOR COURT

SCHOOL DISTRICTS' ALLIANCE FOR ADEQUATE FUNDING OF SPECIAL EDUCATION, et al., Plaintiffs, v. THE STATE OF WASHINGTON, et al., Defendants.	NO. 04-2-02000-7 FINDINGS OF FACT AND CONCLUSIONS OF LAW (CR 52) [PROPOSED]

This matter came on for trial before the Honorable William Thomas McPhee, Judge of the Superior Court of Washington in Thurston County. Trial commenced on October 30, 2006 and fact-finding concluded on November 20, 2006. The parties presented their closing arguments on December 1, 2006. The Court issued a written Court's Opinion on March 1, 2007. The Opinion is attached hereto and incorporated by reference herein.

Kirkpatrick & Lockhart Preston Gates Ellis L.L.P. and attorneys John Bjorkman and Cabrelle Abel represented plaintiffs in this case. The Washington Attorney General's Office, through Assistant Attorneys General William Clark, Newell Smith and Drew Zavatsky, represented defendants.

The Court, having heard the testimony presented by the parties, having reviewed all exhibits and deposition excerpts admitted into evidence, having considered the legal memoranda and closing argument by the parties, and having issued its written Opinion in this case on March 1, 2007, enters the following:

I. FINDINGS OF FACT

A. Parties

1. The plaintiffs are an Alliance of public school districts of the State of Washington, and Bellingham School District No. 501, Bethel School District No. 403, Burlington-Edison School District No. 100, Everett School District No. 2, Federal Way School District No. 210, Issaquah School District No. 411, Lake Washington School District No. 414, Mercer Island School District No. 400, Northshore School District No. 417, Puyallup School District No. 3, Riverside School District No. 416, Spokane School District No. 81 ("Plaintiffs" or the "Alliance").

2. Defendants are the State of Washington, representatives of the two political branches of government, and the agency bearing overall responsibility for education in Washington State: for the Executive, Governor Christine Gregoire; for the legislature, Brad Owen, President of the Senate, and Frank Chopp, Speaker of the House; and Terry Bergeson, the Superintendent of Public Instruction. The Office of the Superintendent of Public Instruction (OSPI) is responsible for, among other things, allocating special education funding to the school districts, receiving financial reports and enrollment data for special education from the districts, interfacing with the federal government regarding special education funding and reporting requirements and monitoring special education compliance with the requirements of federal and state special education laws and regulations.

B. Basic Framework: Special Education Law

3. In 1971, the Washington legislature recognized the rights of disabled students when it passed the "Education for All Act," chapter 28A.13 RCW (subsequently recodified as

chapter 28A.155 RCW). Each biennium, the legislature sets the funding formula for special education through its Appropriations Act, Chapter 518, Laws of Washington 2005, § 507 (hereinafter, "Section 507).

4. In 1977, the legislature adopted the Basic Education Act, RCW 28A.150.200, *et seq.* RCW 28A.150.250 and 28A.150.260 provide for an annual basic education allocation ("the BEA") of state funds based upon the average full-time equivalent (FTE) student enrollment in each school district. The BEA is the same for all FTE students in a district. It is based on the average cost of a basic education for an average student.

5. Funding is expanded for special education students. As with the BEA, a district receives revenue calculated as a per capita allocation for each special education student in the district. The population of students receiving special education services, however, is counted differently; it is a headcount of all students in the district receiving special education services, without conversion to full-time equivalency. Like the BEA, this excess cost allocation is based on an average cost—it is the additional cost of educating an average special education student, with average disabilities, in excess of the BEA for that student. Since 1995, the legislature has allocated this excess cost on a formula of 0.9309 times the BEA. Thus, the total allocation for each FTE special education student is 1.9309 X BEA.

6. Under state and Federal law, school districts must create an Individualized Education Program ("IEP") for each disabled child.

7. A properly formulated IEP determines every handicapped student's appropriate special education program.

8. The choices and responsibility for educating children are left to the local districts through the students' IEPs subject to statewide minimum standards.

C. Washington State Special Education Financing System and Funding Formula

9. The legislature selected the 0.9309 times BEA funding formula as part of a new financing system in 1995, and has re-enacted it in every subsequent budget. Washington's experience as of 1995 had demonstrated that the total average cost of educating a special education student was 1.87 times the cost of a basic education student.

10 Current national data fixes the total average cost of educating a student receiving special education services (basic education plus special education) at approximately 190 percent of the total average cost of the basic education of a student.

11. Plaintiffs' expert, Dr. Parrish, found in his 2002 study that nationwide the average total excess expenditures for special education services were about 90% of average total basic education expenditures.

12. Pursuant to the funding system initiated in 1995, the legislature provides funds for special education through its budget appropriations acts. Currently, Section 507 provides in relevant part:

a. Pursuant to RCW 28A.150.390, funding for special education is provided on an excess cost basis. ¶ 1.

b. School districts shall ensure that special education students as a class receive their full share of the basic education apportionment. ¶ 1.

c. To the extent school districts can not provide an appropriate education for special education students through the basic education apportionment, services shall be provided using the special education excess cost allocation. ¶ 1.

d. OSPI shall use the excess cost methodology using the S-275 personnel reporting and other accounting systems to ensure that (a) special education students are basic education students first, (b) as a class, special education students are entitled to the full basic education allocation and (c) special education students are basic education students for the entire school day. ¶ 2(a).

e. Federal and state funds are distributed based on a headcount of special education students receiving specially designed instruction in accordance with a properly formulated IEP. ¶¶ 4 and 5.

f. The special education allocation for school districts for disabled children birth through two is the average headcount of those children multiplied by the

districts average basic education allocation per each basic education FTE, multiplied by 1.15. For disabled children ages 3 to 21 the multiplier is 0.9309 times the average basic education allocation times the "enrollment percent" of special education students to basic education students in that district. ¶ 5(a).

g. The special education funding is limited to a maximum 12.7 percent of the general student population for each district. ¶ 6(a).

h. A Safety Net is provided that serves as a method for districts with demonstrated need for special education funding beyond the amounts provided above to secure that additional funding. ¶ 8.

i. The Safety Net oversight committee ("Committee") awards Safety Net funds. ¶ 8.

j The Committee first considers unmet needs for districts that can convincingly demonstrate that all legitimate expenditures for special education exceed all available revenues from state funding formulas. ¶ 8(a).

k. The Committee then considers the extraordinary high cost needs of one or more of a district's special education students. ¶ 8(b).

13. Presently, state Safety Net funds are available for students whose excess cost of special education services exceeds about $15,000 and federal Safety Net funds are available for excess costs above about $21,000.

D. Washington State Special Education Financing System: Safety Net

14. The 1995 financing system emerged as a substitute for an earlier system based upon 14 disability categories. The 12.7% cap served, among other interests, the legitimate interest of curbing the growth rate in students identified as in need of special education. At that time, the number of special education students was growing at a much greater rate than the overall student population.

15. The Safety Net system has been re-enacted in the special education appropriations acts in each budget since 1995. The Safety Net system is designed to provide more monies to districts that are not adequately funded under the formula.

16. Initially, there were two categories of Safety Net funds reimbursable from the state and one category of Safety Net funds reimbursable from the federal government.

17. In 2002, the State eliminated state-funded Safety Net categories. The Safety Net for High Cost Individual Students remained in place.

18. The 2002 Safety Net changes eliminated the districts' ability to apply for Safety Net or other additional funding for their special education population above 12.7%.

19. By statute, districts applying for Safety Net may not include supplemental contracts in their calculation of demonstration of need. In addition, Section 507 limits the calculation of indirect costs in Safety Net to 4 percent of direct expenditures.

20. Prior to the 2004-05 school year, the total amount of Safety Net relief provided by the legislature was never exhausted.

21. There was no evidence presented that the cost of educating a special education student above the 12.7% cap is averaged into the allocation paid for students below the cap.

22 A cap without a Safety Net assures that districts whose special education populations exceed 12.7 percent will not receive any excess cost allocation for those students above the cap.

23. The former Safety Net "Demographics" category was designed to relieve school districts that attract special education students because of the high quality of medical and social services available to the disabled in the area encompassed by the district. Spokane is an example of such a district.

E. Findings Regarding Alleged Underfunding

F196 Analysis

24. Districts provide annual financial reports (F196 reports) to the Office of the Superintendent of Public Instruction (OSPI) that contain the districts' revenues and expenditures pursuant to OSPI accounting rules.

25. The F196 reports do not separate the amounts of basic education revenues that arise due to the special education students residing in each school district.

26. Special education revenues on the F196 Report do not contain the BEA to which each special education student is entitled.

27. The F196 reports do not demonstrate that districts, in fact, are applying the BEA as directed.

28. Plaintiffs' expert, Dr. Tom Parrish, also confirmed that the F196-based comparison of excess costs over 4121 revenues cannot establish underfunding of special education.

F. 1077 Cost Accounting Methodology

29. The purpose of the 1077 methodology is to provide a uniform statewide allocation of basic education support for special education services.

30. The 1077 methodology includes two key assumptions relevant to this case:

- Special education students receive their appropriate share of basic education support from basic education staff when served in the regular classroom.
- When special education students are served outside the regular classroom, basic education dollars follow them to partially support special education services they receive

31. The 1077 methodology is solely for allocation of costs; it does not allocate revenue or identify sources of revenue.

32. The 1077 worksheet is a series of reasonably complex calculations that allocates to special education and basic education the cost of each special education teacher.

33. Examples offered at trial demonstrated that the average (rounded off) allocation of such teacher costs was 38 percent to basic education and 62 percent to special education.

G. Indirect Costs

34. The school districts report all of the district-wide indirect costs (overhead) in Program 97 expenditures on their annual F196 reports.

35. The State pays most of these costs.

36. No attempt is made on the F-196 to allocate the payments for indirect costs among basic education, special education, or other programs.

37. For example, the Lake Washington School District F196 report for sy2004-05 shows Program 97 expenditures of $20,084,105.

38. In Lake Washington's accounting of Program 97 revenue for these costs, state revenue paid $15,106,206, federal revenue paid $152,860, and the balance of $4,824,968 was paid by other resources.

39. It is impossible to determine what proportion of this money was used to pay special education related indirect expenditures, if any.

H. Supplemental Contracts

40. Most special education programs offer supplemental contracts and time, responsibility, and incentive (TRI) pay in order to attract and retain special education teachers and administrators.

41. There was no evidence why such contracts and extra pay are a component of basic education.

I. Federal IDEA Funds

42. The only evidence of this issue at trial was that Spokane's excess cost allocation for sy2004-05, for example, was reduced by $127.35 per student because federal IDEA funds were used to offset teacher salary and benefit increases, thereby reducing the BEA and consequently the excess cost allocation. No evidence of why this occurred was offered.

J. Plaintiffs' Expert Testimony

45. Dr. Parrish's conclusions concerning the need to change staffing ratios for special education were not persuasive

CONCLUSIONS OF LAW

1. This Court has jurisdiction over the parties and the subject matter of this dispute. Venue in this county is appropriate.

2. The acts of the State, acting through the legislature and the Office of Superintendent of Public Instruction, that are subject to scrutiny are those acts that reflect the State's current funding approach. What occurred beforehand may have historical relevance, but is not what is judged here.

3. With respect to a challenge under Wash. Const. Art. IX, §§ 1 and 2, a court should presume that an act of the legislature is constitutional; a party challenging a legislative act or statute must prove it unconstitutional beyond a reasonable doubt; the preponderance of evidence standard is applicable to questions of fact and the beyond a reasonable doubt standard is applicable to review of constitutional issues of law; and, the judiciary should defer to the legislature, and restrain its role to providing only broad constitutional guidelines within which the legislature may work.

4. The legislature has the authority to select the means to discharge its duty under Wash. Const. Art. IX, § 1 and 2.

5. The task of the Court when deciding a facial challenge to legislation is to determine whether the statute or act is unconstitutional on its face without regard to the manner in which it is enforced. A facial challenge must be rejected unless there is no set of circumstances in which the law can constitutionally be applied.

6. Section 507 of the appropriations act is not unconstitutional beyond a reasonable doubt on its face or as applied. The amount appropriated in Section 507 is not on its face or as applied so deficient that the appropriation is unconstitutional.

7. Plaintiffs also have failed to carry their burden of proving that the special education multiplier of .9309 violates Article IX of the Washington Constitution. The legislature's approach of using a multiplier to couple special education funding to BEA funding is rational and constitutional. The adequacy of the BEA is not an issue before this Court.

8. Washington's excess cost formula is consistent with current national data on the total average cost of educating a student receiving special education services (Finding of Fact No. 10), and Dr. Parrish's 2002 study (Finding of Fact No. 11).

9. Plaintiffs' evidence of the excess of basic education expenditures over the BEA and the testimony of the State's CR 30(b)(6) witness falls well short of that required for constitutional review of basic education funding.

10. A special education student is first and foremost a basic education student all during the school day. Thus, a district must expend all of the BEA and all of the excess cost allocation received for its special education students before the district can contend that the legislature has underfunded its special education program.

11. The 38% of the BEA for students receiving special education services that the 1077 method allocate to basic education in the examples offered at trial (Finding of Fact No. 33) is significantly less than the percentage of state support for special education that is BEA.

12. The 12.7 percent cap was created as a way to control the growth of the special education population as a percentage of the total student population by compelling school districts to confront over-identification of special education students. The cap was a rational choice by the legislature to meet a significant problem.

13. Though the 12.7 percent cap is rational and constitutional, its application in Section 507, without allowing districts over the cap to apply for additional funding, through Safety Net or otherwise, is unconstitutional and in violation of Article IX, Section 1, of the State Constitution.

14. A cap with a safety net permits a school district to seek the excess cost allocation for its students over the cap, but gives the State the opportunity to analyze the district's entire special education program, to assure before an award of safety net funds that the district's special education students are eligible and have current, properly formulated IEPs,

that the district is accessing all available revenue, and that it is operating a reasonably efficient special education program.

15. A safety net is not the only approach to addressing the constitutional imperative to fund special education. The legislature can, but is not obliged to, use a Safety Net. The means of satisfying the constitutional duty to fund education remains the legislature's exclusive prerogative.

16. A safety net is not part of the State's constitutional duty to make ample provision for special education.

17. Dependable and regular funding has never been a constitutional requirement. Rather, revenue for schools must come from a dependable and regular tax source.

18. The conditions and limitations in Section 507 do not, on their face or as applied, limit districts' access to Safety Net funds beyond a reasonable doubt.

19. There is no persuasive evidence of a difference between the BEA and basic education expenditures; the BEA is required by law to be the cost of basic education ("fully funded", RCW 28A.150.250).

20. Districts applying for Safety Net funding may not include indirect costs of 16.7 percent (the average state recovery rate) in computing eligibility for Safety Net funds. The State currently allows indirect costs of approximately 4 percent for such applications. This is reasonable. The fact that a higher rate could be used or that additional indirect costs could be included in Safety Net applications does not prove that the failure to use another rate is constitutionally inadequate.

21. Supplemental contracts and TRI pay are not part of an article IX, section 1, constitutional analysis. There is no basis here for declaring RCW 28A.400.200(4) unconstitutional.

22. Plaintiffs' evidence regarding the alleged diversion of Federal IDEA funds is wholly inadequate to prove a constitutional violation.

23. Finally, there is no basis to retain jurisdiction in this case.

DATED this 12 day of April, 2007.

WM. THOMAS MCPHEE, JUDGE

Presented by:

ROBERT M. MCKENNA
Attorney General

WILLIAM G. CLARK, WSBA # 9234
Assistant Attorney General
Attorneys for Defendants

Approved as to form;
Approved for entry:

KIRKPATRICK & LOCKHART PRESTON GATES ELLIS LLP

By
John C. Bjorkman, WSBA # 13426
Attorneys for Plaintiffs.

The above findings and conclusions are prepared by defendant (and approved for entry by plaintiffs) from the court's 27 page written opinion on file herein. I intend that the written opinion be incorporated into my findings and conclusions.

EXHIBIT 4

COPY RECEIVED
By_____Time_____

APR 2 6 2007

FOSTER PEPPER PLLC

THE HONORABLE PARIS K. KALLAS

STATE OF WASHINGTON
KING COUNTY SUPERIOR COURT

MATHEW & STEPHANIE McCLEARY, on their own and on behalf of KELSEY & CARTER McCLEARY, their two children in Washington's public schools; ROBERT & PATTY VENEMA, on their own behalf and on behalf of HALIE & ROBBIE VENEMA, their two children in Washington's public schools; and NETWORK FOR EXCELLENCE IN WASHINGTON SCHOOLS ("NEWS"), a state-wide coalition of community groups, public school districts, and education organizations,

Petitioners,

v.

STATE OF WASHINGTON,

Respondent.

NO. 07-2-02323-2 SEA

RESPONDENT'S FIRST REQUESTS FOR PRODUCTION TO ALL PETITIONERS

TO: ALL PETITIONERS

AND TO: THOMAS F. AHEARNE and RAMSEY RAMERMAN of Foster Pepper LLC, Their Attorneys

ATTORNEY GENERAL OF WASHINGTON
Complex Litigation Division
800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188
(206) 464-7352

You are hereby directed to respond to the enclosed discovery requests within 30 days of service upon your attorneys. Respondent issues these requests pursuant to Civil Rules 26 and 34 and petitioners should produce responsive documents at the Office of the Attorney General, 800 Fifth Avenue, Suite 2000, Seattle, WA 98108-3188.

MATTERS OF INSTRUCTION AND DEFINITION

1. Respondent has directed this discovery to each and all of the Petitioners. However, these requests are also directed to the entities and organizations that are members or participants of NEWS, as described in paragraph 3 of the Petition. If NEWS or its members claims that they cannot or will not obtain the production of responsive discovery from these entities and organizations, please say so unequivocally.

2. "You" and "Your" refer individually and collectively to the Petitioners named in the Petition.

3. "Petition" refers to the pleading filed by the Petitioners (McCleary, Venema and NEWS) on or about January 11, 2007.

4. Should you withhold responsive documents or materials on ground(s) of privilege, please provide a log identifying all such documents or materials by author/sponsor, date, subject matter and distribution.

5. "Documents" shall include items described in Civil Rule 34(a) and shall also include drafts, electronic documents and messages, as well as electronically stored information in reasonably usable form.

6. If not otherwise specified, the time frame for these discovery requests is January 1, 2001, to the present.

ATTORNEY GENERAL OF WASHINGTON
Complex Litigation Division
800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188
(206) 464-7352

REQUEST FOR PRODUCTION NO. 1: Produce all documents that support, negate, refer or relate to the contention that respondent does not provide ample funding for the education of Washington's school children.

RESPONSE:

REQUEST FOR PRODUCTION NO. 2: Produce all documents that study or analyze the cost of providing education to Washington's school children.

RESPONSE:

REQUEST FOR PRPODUCTION NO. 3: Produce all documents that refer or relate to studies or analyses of the cost of providing education to Washington's school children.

RESPONSE:

REQUEST FOR PRODUCTION NO. 4: Produce all documents that support, negate, refer or relate to your contention that respondent has not determined the cost of providing education to Washington's school children.

ATTORNEY GENERAL OF WASHINGTON
Complex Litigation Division
800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188
(206) 464-7352

RESPONSE:

REQUEST FOR PRODUCTION NO. 5: Produce all documents that support, negate, refer or relate to your contention that Washington has not provided stable, regular and reliable sources of funding for the education of Washington's school children.

RESPONSE:

REQUEST FOR PRODUCTION NO. 6: Produce all documents that support, negate, refer or relate to your contention that respondent does not provide the funding needed to provide Washington school children with the opportunity to meet the goals stated in RCW 28A.150.210.

RESPONSE:

ATTORNEY GENERAL OF WASHINGTON
Complex Litigation Division
800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188
(206) 464-7352

REQUEST FOR PRODUCTION NO. 7: Produce all documents that support, negate, refer or relate to the contention that respondent does not provide the funding needed to meet the standards expressed in the Essential Academic Learning Requirements ("EALRS").

RESPONSE:

REQUEST FOR PRODUCTION NO. 8: Produce all documents that refer or relate to the study "Washington Adequacy Funding Study 2007", dated January 2007 and conducted by the Educational Policy Improvement Center and/or Dr. David Conley.

RESPONSE:

REQUEST FOR PRODUCTION NO. 9: Produce all documents that support, negate, refer or relate to the contention in paragraph 100 of the Petition that the Washington Legislature has recognized that Article IX requires the State to ensure that each child receives the broad education described by the state Supreme Court in paragraph 13 of the Petition.

RESPONSE:

ATTORNEY GENERAL OF WASHINGTON
Complex Litigation Division
800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188
(206) 464-7352

REQUEST FOR PRODUCTION NO. 10: Produce all documents that support, negate, refer or relate to the contention in paragraph 101 of the Petition that the Washington Legislature has defined basic education to include the statutory provisions quoted in paragraph 30 of the Petition and the resulting EALR requirements noted in paragraph 36 of the Petition.

RESPONSE:

REQUEST FOR PRODUCTION NO. 11: Produce all documents that support, negate, refer or relate to the contention in paragraph 102 of the Petition that the legislature has defined the minimum content of education required by Article IX of the state Constitution in establishing the provisions and requirements noted in paragraphs 30 and 36 of the Petition.

RESPONSE:

REQUEST FOR PRODUCTION NO. 12: Produce all documents that support, negate, refer or relate to the contention in paragraph 103 of the Petition that the State has not determined how much the basic education (that incorporates the provisions and requirements in paragraphs 30 and 36 of the Petition) actually costs.

RESPONSE:

ATTORNEY GENERAL OF WASHINGTON
Complex Litigation Division
800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188
(206) 464-7352

REQUEST FOR PRODUCTION NO. 13: Produce all documents that demonstrate, refer or relate to the amount(s) petitioners believe represent the actual costs of basic education in Washington for school years 2001 to the present.

RESPONSE:

REQUEST FOR PRODUCTION NO. 14: Produce all documents that support, negate, refer or relate to the contention in paragraph 104 of the Petition that the State has not determined how much it costs to provide the constitutionally required basic education to Washington's school children.

RESPONSE:

REQUEST FOR PRODUCTION NO. 15: Produce all documents that support, negate, refer or relate to the contention in paragraph 105 of the Petition that the State's process for funding education is not to first determine the amount of money it actually costs to provide to provide the required basic education to every child and then fully fund that amount.

RESPONSE:

ATTORNEY GENERAL OF WASHINGTON
Complex Litigation Division
800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188
(206) 464-7352

REQUEST FOR PRODUCTION NO. 16: Produce all documents that support, negate, refer or relate to the contention in paragraph 106 of the Petition that the State's process for funding education is to first consider how much of the state budget will be allocated for education, as opposed to other state operations and then fund that allocated amount.

RESPONSE:

REQUEST FOR PRODUCTION NO. 17: Produce all documents that support, negate, refer or relate to the contentions in paragraphs 108(a) through (d) of the Petition that the Washington State Constitution requires the funding and/or basic education alleged in these paragraphs.

RESPONSE:

REQUEST FOR PRODUCTION NO. 18: Produce all documents that support, negate, refer or relate to the contention in paragraphs 108(h) through (i) of the Petition that the Washington State Constitution requires the State to follow the steps or process described in these paragraphs.

ATTORNEY GENERAL OF WASHINGTON
Complex Litigation Division
800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188
(206) 464-7352

RESPONSE:

REQUEST FOR PRODUCTION NO. 19: Produce all documents that support, negate, refer or relate to the contention in paragraph 108(j) of the Petition that the State of Washington currently is not – and for the past 30 years has not been – complying with its paramount education duty.

RESPONSE:

REQUEST FOR PRODUCTION NO. 20: Produce all documents that constitute, refer or relate to communications between petitioners and representatives of respondent about the funding of basic education by the State of Washington or about the process of funding basic education.

RESPONSE:

REQUEST FOR PRODUCTION NO. 21: Produce all documents that constitute, refer or relate to communications between any of the entities described in paragraph 3 of the Petition and respondent about the funding of, or respondent's process of funding for, basic education.

RESPONSE:

REQUEST FOR PRODUCTION NO. 22: Produce all documents that constitute, refer or relate to facts, opinions or conclusions about which any expert(s), retained by petitioners, are expected to testify at trial.

RESPONSE:

REQUEST FOR PRODUCTION NO. 23: Produce a resume, curriculum vitae and a description of prior engagements (including a listing of prior deposition or trial testimony) for each expert retained to testify at trial.

RESPONSE:

ATTORNEY GENERAL OF WASHINGTON
Complex Litigation Division
800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188
(206) 464-7352

REQUEST FOR PRODUCTION NO. 24: Produce all documents that relate to the formation, incorporation, or that describe the principal activities, of petitioner Network for Excellence in Washington Schools.

RESPONSE:

REQUEST FOR PRODUCTION NO. 25: Produce all documents that demonstrate, analyze or discuss the exact dollar amount(s) of state funding, per Washington student, that you contend is necessary to meet the State's constitutional obligations regarding education.

RESPONSE:

REQUEST FOR PRODUCTION NO. 26: Produce all documents that demonstrate, analyze or discuss the average class size (see paragraph 49 of the Petition) for each of grades K through 12 that you contend is necessary in order for Washington to provide all children the education required by the State constitution.

RESPONSE:

ATTORNEY GENERAL OF WASHINGTON
Complex Litigation Division
800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188
(206) 464-7352

REQUEST FOR PRODUCTION NO. 27: Produce all documents that demonstrate, analyze or discuss the amount(s) in compensation you contend (see paragraph 52 of the Petition) is the "fair pay" for teachers and other professionals needed to provide Washington's students with the education required by the State constitution.

RESPONSE:

REQUEST FOR PRODUCTION NO. 28: Please produce all media or other statements you have made in any form to any person regarding the acts, programs, events, or claims referred to in the Petition.

RESPONSE:

REQUEST FOR PRODUCTION NO. 29: Produce all documents that support, negate, refer or relate to the contention that property taxes and sales taxes do not constitute regular and dependable or sustainable tax source(s) to fund the basic program of education in Washington State.

RESPONSE:

ATTORNEY GENERAL OF WASHINGTON
Complex Litigation Division
800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188
(206) 464-7352

REQUEST FOR PRODUCTION NO. 30: Produce all documents that support, negate, refer or relate to the contention that tax source(s) other than property taxes and sales taxes constitute regular and dependable tax source(s) to fund the basic program of education in Washington State.

RESPONSE:

DATED this 20th day of April, 2007.

ROBERT M.. MCKENNA
Attorney General

WILLIAM G. CLARK, WSBA #9234
Assistant Attorney General
DIERK MEIERBACHTOL, WSBA #31010
Assistant Attorney General
Attorneys for Respondent

VERIFICATION

_____ hereby declares the following to be true and correct under penalty of perjury pursuant to the laws of Washington.

I am the _____, of the Petitioner McCleary, and am authorized to make this verification on its behalf. I have read the foregoing responses to RESPONDENT'S FIRST REQUESTS FOR PRODUCTION TO ALL PETITIONERS, know the contents thereof, and believe the same to be true.

DATED this _____ day of _____, 2007, at _____, Washington.

_____

ATTORNEY GENERAL OF WASHINGTON
Complex Litigation Division
800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188
(206) 464-7352

VERIFICATION

_____ hereby declares the following to be true and correct under penalty of perjury pursuant to the laws of Washington.

I am the _____, of the Petitioner Venema, and am authorized to make this verification on its behalf. I have read the foregoing responses to RESPONDENT'S FIRST REQUESTS FOR PRODUCTION TO ALL PETITIONERS, know the contents thereof, and believe the same to be true.

DATED this _____ day of _____, 2007, at _____, Washington.

_____

ATTORNEY GENERAL OF WASHINGTON
Complex Litigation Division
800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188
(206) 464-7352

VERIFICATION

_____ hereby declares the following to be true and correct under penalty of perjury pursuant to the laws of Washington.

I am the _____, of the Petitioner Network for Excellence in Washington Schools (NEWS), and am authorized to make this verification on its behalf. I have read the foregoing responses to RESPONDENT'S FIRST REQUESTS FOR PRODUCTION TO ALL PETITIONERS, know the contents thereof, and believe the same to be true.

DATED this _____ day of _____, 2007, at _____, Washington.

_____

ATTORNEY GENERAL OF WASHINGTON
Complex Litigation Division
800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188
(206) 464-7352

CERTIFICATION

The undersigned attorney for the State of Washington has read the foregoing Interrogatories and the answers thereto, and they are in compliance with CR 26(g).

DATED this _____ day of _____, 2007, at Seattle, Washington.

_____

Thomas F. Ahearne, WSBA No. 14844
Ramsey Ramerman, WSBA No. 30423
Attorneys for Petitioner

ATTORNEY GENERAL OF WASHINGTON
Complex Litigation Division
800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188
(206) 464-7352

PROOF OF SERVICE

I certify that I served a copy of this document on all parties or their counsel of record on the date below as follows:

☐ US Mail Postage Prepaid via Consolidated Mail Service

☒ ABC/Legal Messenger

☐ State Campus Delivery

☐ Hand delivered by _____

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 20th day of April, 2007, at Seattle, Washington

Agnes Roche

AGNES ROCHE

EXHIBIT 5

Washington Education Association News Release
3/31/07
Contact: Rich Wood at rwood@washingtonea.org, 253-376-1007; or Debra Carnes at 253-219-6628

WEA members elect new leaders, reaffirm WASL stance

Today at their annual convention in Tacoma, members of the Washington Education Association elected a new president and vice president and reaffirmed their opposition to using the WASL test to make high-stakes decisions about students and schools.

Delegates at the WEA's annual Representative Assembly elected Mercer Island teacher Mary Lindquist to a two-year term as WEA president. Lindquist currently serves as president of the Mercer Island Education Association and the WEA Sammamish Council. She will take office in July. Current WEA President Charles Hasse has served six years and was barred by term limits from running for reelection.

Lindquist vowed to continue WEA's focus on improving school funding and changing the way the WASL is used.

"We should not support any single high-stakes test, not for fourth graders, not for seventh graders and certainly not to determine who graduates from our high schools," Lindquist said. "As WEA president, I also will ensure our organization always fights for adequate lifelong compensation for all educators."

Kennewick High School physics teacher Mike Ragan was elected WEA vice president. Ragan, a former engineer, currently serves as president of the WEA-Southeast Council in the Tri-Cities. He will replace WEA Vice President Dave Scott in July.

Everett Education Association President Kim Mead was elected to serve on the National Education Association Board of Directors.

Delegates at the WEA Representative Assembly in Tacoma also approved an open letter to Superintendent of Public Instruction Terry Bergeson that urges her to stop using the WASL to make "high-stakes decisions such as grade retention, graduation and program options."

The letter calls the current WASL-based student assessment system unfair, misleading, inaccurate, troubling and harmful to students.

Delegates also approved motions in support of modifying the federal Elementary and Secondary Education Act (aka No Child Left Behind) and making substantial improvements in educators' pensions. Educator compensation remains WEA's No. 1 priority.

At a lunchtime rally at a nearby plaza, WEA members urged the state Legislature to increase funding for public schools, including smaller class sizes and educator salaries, health benefits and pensions. Washington's annual spending per student is 42nd in the nation.

Leaders from the Seattle Education Association at the convention announced the union's new affiliation with the AFL-CIO. The agreement brings together Seattle's largest union, representing 4,200 teachers and education support professionals, with the AFL-CIO's King County Labor Council and the national AFL-CIO, a federation of unions representing 9 million workers. SEA, which remains affiliated with WEA and the NEA, is the first NEA local in the United States to affiliate with the AFL-CIO under a new arrangement between the two groups.

###

EXHIBIT 6

8 N.Y.3d 14, 861 N.E.2d 50, 828 N.Y.S.2d 235, 216 Ed. Law Rep. 200, 2006 N.Y. Slip Op. 08630

(Cite as: 8 N.Y.3d 14, 2006 N.Y. Slip Op. 08630)

▷

****1** Campaign for Fiscal Equity, Inc., et al., Appellants-Respondents
v
State of New York et al., Respondents-Appellants.

Court of Appeals of New York

Argued October 10, 2006

Decided November 20, 2006
CITE TITLE AS: Campaign for Fiscal Equity, Inc. v State of New York

SUMMARY

Cross appeals, on constitutional and other grounds, from an order of the Appellate Division of the Supreme Court in the First Judicial Department, entered March 23, 2006. The Appellate Division, with two Justices dissenting, modified, on the law and the facts, an order of the Supreme Court, New York County (Leland DeGrasse, J.), which had (a) granted plaintiffs' motion to confirm the Referees' Report to the extent of directing defendants (1) to implement an operational funding plan that would provide the New York City School District with additional operating funds of $5.63 billion, phased in over four years, (2) to conduct studies, commencing no later than July 1, 2008, and every four years thereafter, to determine the costs of providing a sound basic education to all public school students in New York City, (3) to use those studies to determine annual funding, (4) to implement a capital funding plan whereby they expend $9.179 billion over a five-year span from 2005 to 2010 for capital improvements, (5) to undertake no later than July 1, 2009, and every five years thereafter, capital improvement funding studies, (6) to require the New York City Department of Education to develop a comprehensive sound basic education plan that would set forth in a detailed manner the precise management reforms and instructional initiatives that the City Department of Education (DOE) would undertake, and (7) to take steps necessary to ensure that the DOE shall issue an annual comprehensive Sound Basic Education Report that would provide all stakeholders with the information necessary to measure the performance of DOE, the City's schools and the City's students; and (b) denied defendants' cross motion for an order rejecting the Referees' Report. The modification consisted of vacating the confirmation of the Referees' Report and directing that, in enacting a budget for the fiscal year commencing April 1, 2006, the Governor and the Legislature consider, as within the range of constitutionally required funding for the New York City School District, as demonstrated by the record before the Appellate Division, the proposed funding plan of at least $4.7 billion in additional annual operating funds and the referees' recommended ***15** annual expenditure of $5.63 billion, or an amount in between, phased in over four years, and that they appropriate such amount, in order to remedy the constitutional deprivations found in *Campaign for Fiscal Equity v State of New York* (100 NY2d 893 [2003]), and that, in enacting such budget, the Governor and the Legislature implement a capital improvement plan that expends $9.179 billion over the next five years or otherwise satisfies the city schools' constitutionally recognized capital needs. The Appellate Division affirmed the order as modified.

Campaign for Fiscal Equity, Inc. v State of New York, 29 AD3d 175, modified.

HEADNOTES

Schools
State Aid to School Districts
Remedy for Failure to Provide Sound Basic Education--Compliance-- Appointment of Referees to Hear and Report

(1) Supreme Court erred in appointing a panel of

referees "to hear and report with recommendations" on whether the State had complied with the mandate of the Court of Appeals (*Campaign for Fiscal Equity v State of New York*, 100 NY2d 893 [2003]) that children in New York City's public schools be provided with a sound basic education, as required by the Education Article of the New York Constitution. The State, not Supreme Court, was ordered by the Court of Appeals to ascertain the cost of a sound basic education in New York City. Supreme Court should not have endorsed an examination in which the cost of a sound basic education in New York was calculated anew, when the state budget plan had already reasonably calculated that cost. Supreme Court, accordingly, erred in confirming the report of the referees.

Schools

State Aid to School Districts

Remedy for Failure to Provide Sound Basic Education--Compliance-- Reasonableness of State's Plan

(2) The Governor's proposed State Education Reform Plan reasonably concluded that additional annual operating funds in the amount of $1.93 billion, appropriately adjusted with reference to the latest version of the Geographic Cost of Education Index and inflation since 2004, would ensure children in New York City's public schools the opportunity for a sound basic education, as required by the Education Article of the New York Constitution (*Campaign for Fiscal Equity v State of New York*, 100 NY2d 893 [2003]). Judicial deference to the Legislature's financing plan was justified by the Judiciary's limited access to the controlling economic and social facts and by respect for the doctrine of separation of powers. The use of a cost-effectiveness filter was rationally defensible, and the conclusion that New York City could attain minimal constitutional standards while spending less than the higher-spending group of successful school districts was not irrational. Further, the weightings utilized for children with special needs also had record support.

Schools

State Aid to School Districts

Remedy for Failure to Provide Sound Basic Education--Compliance--Capital Improvement Plan Unnecessary

(3) In determining whether the State was in compliance with the Court of Appeals mandate (*Campaign for Fiscal Equity v State of New York*, 100 NY2d *16 893 [2003]) that children in New York City's public schools be provided the opportunity for a sound basic education, as required by the Education Article of the New York Constitution, the Appellate Division's directive that the Governor and Legislature implement a capital improvement plan was unnecessary inasmuch as the Legislature has set forth a capital construction program designed to allow the State to remedy inadequacies in New York City schools facilities (L 2006, ch 58, part A; ch 61, part I).

Schools

State Aid to School Districts

Remedy for Failure to Provide Sound Basic Education--Compliance-- Additional Accountability Mechanisms Unnecessary

(4) In determining whether the State was in compliance with the Court of Appeals mandate (*Campaign for Fiscal Equity v State of New York*, 100 NY2d 893 [2003]) that children in New York City's public schools be provided the opportunity for a sound basic education, as required by the Education Article of the New York Constitution, the Appellate Division properly struck Supreme Court's requirement of state costing-out studies every four years and requirement that the New York City Department of Education prepare a comprehensive "sound basic education" plan, to ensure accountability. Minimally adequate accountability mechanisms were already in place for the evaluation of New York schools.

RESEARCH REFERENCES

Am Jur 2d, Constitutional Law §§ 270, 773; Am Jur 2d, Schools §§ 6-11, 109-112.

NY Jur 2d, Constitutional Law § 161; NY Jur 2d, Schools, Universities, and Colleges §§ 6-10, 631, 632, 644-649.

ANNOTATION REFERENCE

Validity of public school funding systems. 110

ALR5th 293.

FIND SIMILAR CASES ON WESTLAW
Database: NY-ORCS

Query: basic /2 education /s public /2 school /s financ! fund!

POINTS OF COUNSEL

Simpson Thacher & Bartlett LLP, New York City (*Joseph F. Wayland, Daniel H. Tabak, Jason S. Stone, Chad M. Leicht* and *Lisa H. Rubin* of counsel), and *Michael A. Rebell Associates* (*Michael A. Rebell* and *Molly A. Hunter* of counsel) for appellants-respondents.

I. This Court must issue a clear, enforceable compliance directive. II. The Supreme Court's accountability provisions should be reinstated and linked to prudent planning for a four-year phase-in of the funding increases. III. This Court *17 should issue a final compliance order and retain jurisdiction to consider further enforcement action, if necessary. (*McCain v Dinkins,* 84 NY2d 216.)

Eliot Spitzer, Attorney General, Albany (*Denise A. Hartman, Caitlin J. Halligan* and *Daniel Smirlock* of counsel), for respondents-appellants.

I. Defendants' method of calculating the cost of a sound basic education, properly approved by the Appellate Division, yields the conclusion that $1.93 billion, not $4.7 billion, is the amount of additional spending needed to provide a constitutionally sound education in New York City. (*Board of Educ., Levittown Union Free School Dist. v Nyquist,* 57 NY2d 27; *Paynter v State of New York,* 100 NY2d 434.) II. The Appellate Division erred in holding that New York City is entitled to $9.179 billion for capital projects. III. The Appellate Division should not have vacated the portion of Supreme Court's order requiring New York City to make critical management and accountability reforms that ensure that funds are used effectively. IV. The Court lacks authority to issue an order requiring the State of New York to provide at least an additional $4.7 billion annually for operating expenditures and $9.179 billion for capital improvements in New York City's schools. (*City of New York v State of New York,* 86 NY2d 286; *Pataki v New York State Assembly,* 4 N.Y.3d 75; *Jones v Beame,* 45 NY2d 402; *Anderson v Regan,* 53 NY2d 356; *Marbury v Madison,* 1 Cranch [5 US] 137; *Cohen v State of New York,* 94 NY2d 1; *Schieffelin v Komfort,* 212 NY 520; *Klostermann v Cuomo,* 61 NY2d 525; *People ex rel. Broderick v Morton,* 156 NY 136; *Merritt Hill Vineyards v Windy Hgts. Vineyard,* 61 NY2d 106.) V. The Appellate Division properly rejected Supreme Court's call for follow-up costing-out studies conducted periodically for the indefinite future. (*Board of Educ., Levittown Union Free School Dist. v Nyquist,* 57 NY2d 27.)

Jay Worona, Latham, and *Pilar Sokol* for New York State School Boards Association, Inc., amicus curiae.

I. The separation of powers doctrine does not preclude this Court from issuing a clear enforceable compliance directive. (*Board of Educ., Levittown Union Free School Dist. v Nyquist,* 57 NY2d 27.) II. In enforcing compliance with its prior directive that the State of New York reform its school funding system, this Court should provide guidance on the constitutional parameters applicable to such reform.

Stroock & Stroock & Lavan LLP, New York City (*Charles G.* *18 *Moerdler, Alan M. Klinger, Adam S. Ross* and *Beth A. Norton* of counsel), and *Carol L. Gerstl* for United Federation of Teachers, amicus curiae.

I. Increases in funding, when directed to specific, proven programs, have begun to improve the quality of education provided in New York City public schools, but further increases in funding, far beyond that which the State of New York proposes, are required to provide a sound basic education to all children. II. In order to have true accountability, additional Campaign for Fiscal Equity funds must be spent in a manner consistent with sound educational planning and on programs that have proven successful.

Paul, Weiss, Rifkind, Wharton & Garrison LLP, New York City (*Sidney S. Rosdeitcher, Carmen K. Cheung* and *Evan Norris* of counsel), and *Jonathan Rosenberg* for Association of the Bar of the City of New York, amicus curiae.

The experience in other states in which the political branches have failed to act demonstrates why it is imperative that this Court now issue a clear, precise, and enforceable remedial order. (*Saratoga County Chamber of Commerce v Pataki*, 100 NY2d 801.)

Davis Polk & Wardwell, New York City (*Sharon Katz, Monica Lamb, Christina C. Lindberg, David B. Toscano* and *Margaret A. Vining* of counsel), for Alliance for Quality Education and others, amici curiae.

I. A "generation" of New York City schoolchildren has been denied the constitutionally mandated opportunity for a sound basic education in the 13 years since this action was initiated. II. The Appellate Division erred in vacating the accountability provisions in the Supreme Court's order.

Elizabeth R. Fine, New York City, *Alvin Bragg, James Caras, Laura Popa* and *Scheherazade Salimi* for Council of the City of New York, amicus curiae.

I. The City of New York needs additional state funds to provide a sound, basic education to its schoolchildren. II. The Department of Education (DOE) should submit accountability reports to the Council of the City of New York, which will exercise its New York City Charter-mandated duties to hold DOE accountable.

Community Service Society, New York City (*Juan Cartagena* and *Craig Acorn* of counsel), for Adriano Espaillat and others, amici curiae.

I. This Court must issue a specific and enforceable order because the political branches' failure to meet the constitutional standard results in grave harm to impoverished and racial minority New York City schoolchildren. (*Brown v Board of Education*, 347 US 483; *Alexander v Sandoval*, 532 US *19 275.) II. This Court's issuance of a specific and enforceable order will not offend the separation of powers doctrine. (*Bourquin v Cuomo*, 85 NY2d 781; *Matter of Richardson*, 247 NY 401; *Marbury v Madison*, 1 Cranch [5 US] 137; *Boryszewski v Brydges*, 37 NY2d 361.)

Suzanne Novak, New York City, for Brennan Center for Justice at New York University School of Law, amicus curiae.

New York's dysfunctional legislative process provides unique justification for this Court to issue an enforceable compliance directive. (*Baker v Carr*, 369 US 186; *Reynolds v Sims*, 377 US 533; *Missouri v Jenkins*, 495 US 33; *United States v Carolene Products Co.*, 304 US 144; *Conservation Force, Inc. v Manning*, 301 F3d 985; *Graham v Richardson*, 403 US 365; *Anderson v Celebrezze*, 460 US 780; *San Antonio Independent School Dist. v Rodriguez*, 411 US 1.)

Michael A. Cardozo, Corporation Counsel, New York City (*Leonard Koerner, Alan H. Kleinman, Brad M. Snyder* and *Elizabeth S. Natrella* of counsel), for City of New York, amicus curiae.

I. The Court should affirm the findings regarding the amount of additional funding that the State of New York must provide the City of New York's schools and should order the State to enact the school aid formula reform and provide the additional funds it now concedes are required. (*Board of Educ., Levittown Union Free School Dist. v Nyquist*, 57 NY2d 27; *Wise v Lipscomb*, 437 US 535; *Connor v Finch*, 431 US 407.) II. The State of New York should be prohibited from singling out the City of New York to provide the funds needed to remedy the State's constitutional violation. (*New York County Lawyers' Assn. v Pataki*, 188 Misc 2d 776, 294 AD2d 69; *Doe v Dinkins*, 192 AD2d 270.) III. A rigorous system of accountability already governs the City of New York's schools and no further accountability system should be ordered by this Court. IV. The State of New York's actions regarding capital funds bring a successful resolution to this aspect of the Campaign for Fiscal Equity mandate.

OPINION OF THE COURT

Pigott, J.

In this third appeal by plaintiffs Campaign for Fiscal Equity, Inc. (CFE), et al., we address the cost of providing children in New York City's public schools with a sound basic education. The State estimated this cost to include a minimum of $1.93 billion, in 2004 dollars, in additional annual operating funds. *20 We conclude that this estimate was a reasonable one and that the courts should defer to this estimate, appropriately updated.

I.**2

More than a decade ago, we held that the Education Article of the New York State Constitution requires the State "to offer all children the opportunity of a sound basic education" (*Campaign for Fiscal Equity v State of New York*, 86 NY2d 307, 316 [1995] [*CFE I*]). Plaintiffs had sought a declaratory judgment against the State, claiming that students in New York City public schools were not receiving a basic education and that the State's public school financing system was unconstitutional. [FN1]

Mindful of the fundamental value of education in our democratic society, we agreed with plaintiffs' interpretation of the Education Article. The State must ensure that New York's public schools are able to teach "the basic literacy, calculating, and verbal skills necessary to enable children to eventually function productively as civic participants capable of voting and serving on a jury" (86 NY2d at 316). In assessing adequacy of education, this standard is the constitutional minimum or floor that we had acknowledged earlier, in *Board of Educ., Levittown Union Free School Dist. v Nyquist* (57 NY2d 27, 47- 48 [1982]). Accordingly, we held that plaintiffs' cause of action under the Education Article survived a motion to dismiss (86 NY2d at 318-319), reminding plaintiffs that they would "have to establish a causal link between the present funding system and any proven failure to provide a sound basic education to New York City school children" (86 NY2d at 318).

Plaintiffs succeeded in establishing that causal link, in a 1999-2000 trial concerning the 1997-1998 school year. In 2003, we decided that this trial record supports the conclusion that, because of inadequate funding for their public schools, children in New York City "are not receiving the constitutionally-mandated opportunity for a sound basic education" (*Campaign for Fiscal Equity v State of New York*, 100 NY2d 893, 919 [2003] [*CFE II*]). In *CFE I*, we had understood a sound basic education as teaching skills that enable students to undertake civil responsibilities *21 meaningfully. In *CFE II*, we defined "sound basic education" more exactly, as the "opportunity for a meaningful *high school* education, one which prepares [children] to function productively as civic participants" (100 NY2d at 908 [emphasis added]).

We determined that New York City public schools provided inadequate teaching, because they were unable to attract and retain qualified teachers (100 NY2d at 909-911). They were deficient in at least two instrumentalities of learning: libraries and computers **3(100 NY2d at 913). Moreover, although plaintiffs had not proven "a measurable correlation between building disrepair and student performance, in general" (100 NY2d at 911), they sufficiently demonstrated "that large class sizes negatively affect student performance in New York City public schools" (100 NY2d at 912).

Whether measured by "inputs" or by "outputs," i.e. school completion rates and test results (100 NY2d at 914-919), New York City schoolchildren, we determined, were not receiving the opportunity for a sound basic education. Finally, we concluded that plaintiffs had established the causation element of their claim by showing that increased funding can provide better teachers, facilities and instrumentalities of learning, and that such improved inputs in turn yield better student performance (100 NY2d at 919-925).

Accordingly we directed the State to ensure, by means of "[r]eforms to the current system of financing school funding and managing schools . . . that every school in New York City would have the resources necessary for providing the opportunity for a sound basic education" (100 NY2d at 930).

Noting that "the political process allocates to City schools a share of state aid that does not bear a perceptible relation to the needs of City students" (*id.*), we instructed the State to ascertain the actual cost of providing a sound basic education in New York City, rather than the state as a whole (*id.*). We also held that "the new scheme should ensure a system of accountability to measure whether the reforms actually provide the opportunity for a sound basic education" (*id.*). We gave the State a deadline of July 30, 2004 by which to implement the necessary measures (*id.*) and remitted to Supreme Court for further proceedings in accordance with our opinion (100 NY2d at 932).

Within a matter of weeks, Governor Pataki issued an executive order creating the New York State Commission on Education *22 Reform, charged with recommending, to the Executive and the Legislature, education financing and other reforms that would ensure that all children in New York State have an opportunity to obtain a sound basic education. The Commission, chaired by Frank G. Zarb, published its final report on March 29, 2004.

The Zarb Commission retained Standard and Poor's (S & P) School Evaluation Services to calculate the additional spending required to provide a sound basic education, directing S & P to use a "Successful Schools" model that studies the expenditures of school districts with a proven track record of high student performance. The method had been used by the New York State Board of Regents in its Proposal on State Aid to School Districts for 2004-05.

The Zarb Commission developed three alternative criteria for identifying successful school districts. One option was based on New York's 2007-2008 performance **4 standard set in accordance with the federal No Child Left Behind Act of 2001. Another was similar to the first but substituted the 2006- 2007 performance standard. The third criterion was the same approach to identifying successful schools that the Board of Regents had used; it picked out school districts--281 of 699--in which at least 80% of the students performed at or above a proficient level, over a three-year period, in seven tests required by the Board of Regents: two fourth-grade examinations and five examinations required for high school graduation. [FN2]

Reasoning that not all successful schools operate in a manner that is economical, the Zarb Commission instructed S & P to apply a cost-effectiveness filter: once successful school districts were identified by the methods just described, they were to be ranked according to expenditures and those in the lower-spending half were to be used to create an average. The Board of Regents had noted the necessity for applying such an efficiency filter, because "districts that perform at high levels often enjoy a very substantial wealth base, and therefore also spend at very high per pupil[ ] levels" (Regents Proposal on State Aid to School Districts for 2004-05, at 48, available on the Internet at <http://emsc32.nysed.gov/stateaidworkgroup/2004-*23 05% 20RSAP/RSAP0405.htm>, cached at <http://www.
nycourts.gov/reporter/webdocs/Regents_Item.htm>).

Drawing on an extensive review of pertinent research literature, S & P applied three weightings to the resulting base expenditures, in order to take into account the greater spending required for students with special needs. The coefficients by which the base expenditures were multiplied were 2.1 for students with disabilities, 1.35 for economically disadvantaged students, and 1.2 for students with limited English proficiency. S & P cautioned that it was not in a position to recommend explicitly the set of weightings it applied.

Adjustments were also made to account for the local purchasing power of the dollar, using two, alternative cost indices, the New York Regional Cost Index (NY RCI), provided by the New York State Education Department and based on differences in labor market costs, and the Geographic Cost of Education Index (GCEI), provided by the National Center for Education Statistics. The latter index was developed by Jay Chambers, one of the principal authors of the New York Adequacy Study, a cost analysis project cosponsored by plaintiff CFE in 2003-2004. The GCEI attempts to measure the attractiveness of

employment within a particular district, one of the key determinants of the cost of providing education. S & P used what was then the most recent, publicly available version of the GCEI, a 1997 update by Chambers. Finally, amounts were adjusted for inflation to reflect January 2004 purchasing power. **5

S & P thus calculated "sound basic education" spending estimates for each school district, using the two regional cost indices and the four alternative criteria for identifying successful school districts. The spending estimates did not include capital, debt or transportation costs. Finally, these figures were compared with amounts actually spent in 2002-2003, in order to identify "spending gaps."

Applying the GCEI, the estimated spending gaps for New York City ranged from $1.93 billion to $2.53 billion and the statewide spending gaps from $2.45 billion to $3.39 billion, depending on which criterion for successful school districts was used. (New York City's spending gap thus comprised 74% to 79% of the State's total gap.) When the NY RCI was applied, the estimated spending gaps were larger, ranging from $4.05 billion to $4.69 billion for New York City, and $4.61 billion to *24 $5.57 billion statewide. [FN3] Applying the GCEI and the Board of Regents approach to identifying successful schools, the spending gap for New York City, in 2004 dollars, was $1.93 billion.

Governor Pataki convened the Legislature in extraordinary session on July 20, 2004, and proposed a program bill to the Senate, incorporating the Zarb Commission's methodology. The Senate passed an amended version of the bill. Ultimately, the legislation was not enacted. In both versions of the bill, the Legislature would have found that the actual costs of providing a sound basic education should be determined using the Board of Regents approach to identifying successful schools (which had picked out 281 of 699 school districts), the S & P weightings for students with special needs, the GCEI, and the cost-effectiveness filter (*see* 2004 Extraordinary Session NY Senate Bill S 1-A, § 1, at 2 [July 20, 2004]; 2004 NY Senate Bill S 7684-B, § 2, at 2 [July 20, 2004]).

In other words, Governor Pataki and the Senate endorsed the approach that generated a minimum figure of $1.93 billion as the estimated spending gap in operating expenses for New York City. In his State Education Reform Plan, submitted in the course of this litigation, the Governor concluded that "the S&P analysis as adopted by the Zarb Commission and by State defendants determined that $2.5 billion in additional revenues statewide (equating to $1.9 billion in New York City) was a valid determination of the cost of providing a sound basic education in New York City" (State Education Reform Plan, at 14 [Aug. 12, 2004]).

In his program bill memorandum, Governor Pataki made it clear that he intended **6 New York City schools to receive additional funding that exceeded the minimum cost of a sound basic education. Proposals for a Dedicated State Fund for Sound Basic Education and for a New York City local state aid match would, when coupled with projected increases in state school aid and federal aid, generate "approximately $4.7 billion in additional support over the next five years" (Governor's Program Bill Mem in Support of 2004 Extraordinary Session NY Senate Bill S 1-A, at 4). As noted, the proposed legislation was not enacted. The Legislature, however, passed a bill on August 10, *25 2004, providing $300 million in additional education aid to New York City.

Once the deadline of July 30, 2004 we had set in *CFE II* had passed, Supreme Court set out to determine whether the measures we had declared necessary had been carried out. It appointed a blue-ribbon panel of referees "to hear and report with recommendations" on whether the steps taken by the State brought compliance with *CFE II*.

The Referees conducted numerous hearings, in which they heard from many witnesses, including the Mayor of New York City, the Chancellor of the New York City School District, and representatives of the New York State Division of the Budget and Education Department. They received extensive written submissions, including four compliance plans: the Governor's State Education Reform Plan, drawing on the Zarb Commission; plaintiffs' Plan

for Compliance, which included the New York Adequacy Study, a cost analysis conducted by the American Institutes for Research (AIR) and Management Analysis and Planning, Inc. (MAP); the Regents Proposal on State Aid to School Districts for 2004-05; and a proposal from the City of New York.

Although they accepted the "successful school districts" methodology of the Zarb Commission, the Referees rejected its cost-effectiveness filter, used a 1.5 weighting for economically disadvantaged students in place of the S & P coefficient of 1.35, and insisted on the use of an updated GCEI, prepared for plaintiff CFE's New York Adequacy Study. They concluded that the spending gap in New York City was $5.63 billion in 2004-2005 dollars, rejecting the State's contention that additional funding in the amount of $1.93 billion would ensure the opportunity for a sound basic education in New York City's public schools.

The Referees adopted CFE's capital funding program, "Building Requires Immediate Capital for Kids" (BRICKS), recommending that the State be required to ensure that $9.179 billion in 2004-2005 dollars would be available as funding for capital improvements over the following five years. Additionally, the Referees recommended that costing-out studies be carried out every four years, supervised by the Board of Regents, "until it becomes clear that reforms to the State's education finance formulas have rendered such studies no longer necessary to assure all New York City students the opportunity for a sound basic *26 education" (Report and Recommendations of the Judicial Referees, at 39).**7

On the question of accountability, the Referees concluded that existing state systems, identifying schools that perform poorly and sanctioning failing schools, already provide adequate accountability, and that no new Office of Educational Accountability should be created. They recommended, however, that the current system should be enhanced by the development of a comprehensive "sound basic education" plan by the New York City Department of Education.

Supreme Court confirmed the Judicial Referees' Report and Recommendations. The Appellate Division vacated that confirmation (29 AD3d 175 [2006]). It found support in the record for the State's "cost-effectiveness" approach, as well as for its weighting for economically disadvantaged students. Noting that record support, the Appellate Division observed that

> "Supreme Court should not have substituted the Referees' opinion for that of the State . . . [and] converted a factor that was arguable and reasonable for the Legislature and Governor to consider into an incontrovertible fact. As long as the State's choices remained within the range of professionally accepted practices in determining the costs of a sound basic education, Supreme Court should have left the conclusions for legislative and gubernatorial consideration and determination." (29 AD3d at 184.)

Citing Governor Pataki's proposal to increase funding of the New York City School District by $4.7 billion (over a period of five years), the Appellate Division directed the Governor and Legislature to appropriate at least $4.7 billion in additional operating funds (phased in over four years). [FN4] The Appellate Division also directed the Governor and Legislature to "implement a capital improvement plan that expends $9.179 billion *27 over the next five years or otherwise satisfies the city schools' constitutionally recognized capital needs" (29 AD3d at 191).

Plaintiffs CFE et al. appeal pursuant to CPLR 5601 (a) and (b) (1). The state defendants cross-appeal under CPLR 5601 (b) (1).

II.**8

(1) The Judicial Referees' Report, dated November 30, 2004, commands our attention as well as our respect; it is likely that much of value may be learned from the Referees' careful consideration of methods of ascertaining the cost of a sound basic education and reforms to the current system of public school financing. Nevertheless, we hold that Supreme Court erred by, in effect, commissioning a de novo review of the compliance question. The role of the courts is not, as Supreme Court assumed,

to determine the best way to calculate the cost of a sound basic education in New York City schools, but to determine whether the State's proposed calculation of that cost is rational. Supreme Court should not have endorsed an examination in which the cost of a sound basic education in New York was calculated anew, when the state budget plan had already reasonably calculated that cost. In this respect, we agree with the Appellate Division. It was error to confirm the Referees' Report.

(2), (3)We differ from the Appellate Division, however, in two respects. First, we observe that the state plan found that the cost of providing a sound basic education in New York City was $1.93 billion in additional annual operating funds, and that Governor Pataki's proposal to provide $4.7 billion in additional funding amounted to a policy choice to exceed the constitutional minimum. Second, in light of recently enacted legislation designed to allow the State to remedy inadequacies in New York City schools facilities, we reject as unnecessary the Appellate Division's directive regarding capital improvement.

Therefore, we modify the order of the Appellate Division, in two ways. We declare that the constitutionally required funding for the New York City School District includes, as demonstrated by this record, additional operating funds in the amount of $1.93 billion, adjusted with reference to the latest version of the GCEI and inflation since 2004. We vacate the requirement that the Governor and the Legislature implement a capital improvement plan that either expends $9.179 billion over the following five years "or otherwise satisfies the city schools' constitutionally recognized capital needs." As modified, we affirm.

*28 III.

In *CFE II*, we expressed the necessity for courts to tread carefully when asked to evaluate state financing plans. On the one hand, the Judiciary has a duty "to defer to the Legislature in matters of policymaking, particularly in a matter so vital as education financing, which has as well a core element of local control. We have neither the authority, nor the ability, nor the will, to micromanage education financing." (100 NY2d at 925.) On the other hand, "it is the province of the Judicial branch to define, and safeguard, rights provided by the New York State Constitution, and order redress for violation of them" (*id.*).

The need for deference, where appropriate, is no less important for this Court than **9 it is for the Judiciary as a whole. We are the ultimate arbiters of our State Constitution (*see e.g. Cohen v State of New York*, 94 NY2d 1, 11 [1999]). Yet, in fashioning specific remedies for constitutional violations, we must avoid intrusion on the primary domain of another branch of government. We have often spoken of this tension between our responsibility to safeguard rights and the necessary deference of the courts to the policies of the Legislature. "While it is within the power of the judiciary to declare the vested rights of a specifically protected class of individuals, in a fashion recognized by statute . . . the manner by which the State addresses complex societal and governmental issues is a subject left to the discretion of the political branches of government" (*Matter of New York State Inspection, Sec. & Law Enforcement Empls., Dist. Council 82, AFSCME, AFL-CIO v Cuomo*, 64 NY2d 233, 239-240 [1984] [citations omitted]). When we review the acts of the Legislature and the Executive, we do so to protect rights, not to make policy.

Our deference to the Legislature's education financing plans is justified not only by prudent and practical hesitation in light of the limited access of the Judiciary "to the controlling economic and social facts," but also by our abiding "respect for the separation of powers upon which our system of government is based" (*Matter of 89 Christopher v Joy*, 35 NY2d 213, 220 [1974]). We cannot "intrude upon the policy-making and discretionary decisions that are reserved to the legislative and executive branches" (*Klostermann v Cuomo*, 61 NY2d 525, 541 [1984]).

Deference to the Legislature is especially necessary where it is the State's budget plan that is being questioned. Devising a *29 state budget is a prerogative of the Legislature and Executive; the

Judiciary should not usurp this power. The legislative and executive branches of government are in a far better position than the Judiciary to determine funding needs throughout the state and priorities for the allocation of the State's resources.

We have therefore spoken of the "formidable burden" of proof imposed on "one who attacks the budget plan" (*Wein v Carey*, 41 NY2d 498, 505 [1977]). Indeed, the burden is

> "realistically, impossible as to some categories of estimates. But there are some estimates that could be demonstrated on their face to be unreasonable. An extreme example would be a tripling of the estimates of personal income tax revenue, without a change in the tax rate, in a period in which the economy appears to be on a plateau or in decline." (*Id.*)

The illustrations we gave in *Wein v Carey*, while extreme, were meant to show how patently *irrational* a state financing plan must be, before judicial deference will give way. Judicial intervention in the state budget "may be invoked only in the narrowest of instances" (*id.*).

When we remitted in *CFE II*, we did so in order that Supreme Court would **10 determine, when our deadline had passed, whether the State had implemented the reforms we required--legislation that would ensure that New York City schools have the resources necessary for providing the opportunity for a sound basic education and that would ensure accountability. *CFE II* called for the State to present evidence of its reforms, both predating *CFE II* (*see* 100 NY2d at 927) and following *CFE II*, and for Supreme Court to determine whether they satisfied our directives.

In light of our language in *CFE II* and our jurisprudence as a whole concerning deference to the Legislature in matters of policymaking, it was incumbent upon Supreme Court to begin by making a finding as to whether the State's estimate of the cost of providing a sound basic education in New York City was a *reasonable* estimate. Then the court should have proceeded to determine whether the state plan, as of July 30, 2004, incorporated that sound basic education expenditure in its proposed budget and would, if enacted, ensure a system of accountability. Supreme Court should not have provided a panel of referees with a mandate to make *recommendations* as between compliance *30 proposals--the State's, the plaintiffs', the City's, the Regents'. The State, not Supreme Court, was ordered to ascertain the cost of a sound basic education in New York City.

IV.

We do not believe that Governor Pataki's proposed State Education Reform Plan was unreasonable. In particular, we do not find irrational the Governor's acceptance of the Board of Regents approach to identifying successful schools, the S & P weightings for students with special needs and the cost-effectiveness filter (2004 Extraordinary Session NY Senate Bill S 1-A, § 1, at 2 [July 20, 2004]). As a result, we do not find unreasonable the assertion that "$2.5 billion in additional revenues statewide (equating to $1.9 billion in New York City) was a valid determination of the cost of providing a sound basic education in New York City" (State Education Reform Plan, at 14 [Aug. 12, 2004]). There is substantial record support for that statement.

First, the use of the cost-effectiveness filter is rationally defensible. The variation in spending between New York school districts is very large. [FN5] As S & P explained, averaging the expenditures of *all* successful schools would**11

> "mask a considerable range of per-pupil spending among the individual districts . . . If the concept of 'adequacy' means spending no less, but not necessarily more, than is necessary to produce high achievement levels, then there is reasonable cause to adjust the base expenditure by a measure of *cost effectiveness*. This can be done by ranking the successful districts under each scenario by their base expenditure, and computing the average of the lowest 50% (in terms of spending), which is the same approach used by the New York Board of Regents in its recent study of educational costs. An analysis of the average achievement levels of the lower-spending half of districts shows that they closely resemble the average achievement levels of the upper-spending

half of districts . . . ." (Standard & *31 Poor's Resource Adequacy Study for the New York State Commission on Education Reform, at 46-47 [Mar. 2004].)

The essential premise of the cost-effectiveness filter is that the higher-spending half of the successful districts is spending more than the constitutional minimum--either because those districts spend less efficiently than some others or because they have chosen to do more for their students than the Constitution requires. The State, in adopting S & P's approach, implicitly concluded that New York City could attain minimal constitutional standards while spending less than this higher-spending group of successful districts. The premise, and the conclusion, are no doubt debatable, but we cannot say they are irrational, and they are therefore entitled to deference from the courts.

The S & P weightings for children with special needs also have record support. While S & P did not recommend any particular weighting over another, the coefficients that S & P applied were drawn from an extensive review of relevant research. Indeed the pertinent footnote to S & P's Resource Adequacy Study cites no fewer than 37 articles, reports and other scholarly works (Standard & Poor's Resource Adequacy Study for the New York State Commission on Education Reform, n 16, at 89-92 [Mar. 2004]).

The S & P calculations--applying a 2.1 weighting for students with disabilities, 1.35 for economically disadvantaged students, and 1.2 for students with limited English proficiency, and reaching the conclusion that the spending gap for the New York City School District is $1.93 billion--were reasonable. Although we recognize that legitimate arguments can be made for raising the coefficient for economically disadvantaged students to 1.5, we do not believe that the figure of 1.35 lacks grounding in prudent reason.

Accordingly, we declare that the constitutionally required funding for the New York City School District includes additional operating funds in the amount of $1.93 billion, **12 adjusted with reference to the latest version of the GCEI and inflation since 2004.

V.

Turning to capital improvements, we emphasize again, as we did in *CFE I*, that New York's public schoolchildren "are entitled to minimally adequate physical facilities and classrooms which provide enough light, space, heat, and air to permit children *32 to learn" (86 NY2d at 317). The Appellate Division directed the Governor and the Legislature to implement a capital improvement plan that either expends $9.179 billion over the following five years "or otherwise satisfies the city schools' constitutionally recognized capital needs" (29 AD3d at 191). In choosing its words thus, the Appellate Division was perhaps mindful of the fact that in *CFE II* we did not expressly require the State to calculate the amount of capital funding necessary to remedy deficiencies in facilities, with the result that the State did not carry out a costing-out study for capital funding needs in the way it did for operating costs.

(3)The part of the Appellate Division order that requires a capital improvement plan should be vacated as unnecessary. In 2006, the Legislature set forth a capital construction program totaling $2.6 billion, that includes $1.8 billion for the New York City School District (L 2006, ch 58, part A-2; L 2006, ch 61, part I). Crucially, the Legislature increased the cap for the New York City Transitional Finance Authority by $9.4 billion to help fund the cost of capital improvements, and permitted New York City to pledge future state building aid in order to repay borrowed funds (L 2006, ch 58, part A-3). We are of course bound to decide this case on the record before us. But since the parties now agree that the funds envisaged by the Legislature this year would be sufficient to remedy facilities deficiencies, we believe that there is no need for further judicial direction.

(4) Finally, insofar as the Appellate Division vacated Supreme Court's order confirming the Referees' Report, it struck Supreme Court's call for state costing-out studies every four years and its

requirement that the New York City Department of Education prepare a comprehensive "sound basic education" plan, to ensure accountability. We agree with these results. In particular, we agree with the City of New York, an amicus in this case, that a new and costly layer of city bureaucracy is not constitutionally required. It is undisputed that there are minimally adequate accountability mechanisms now in place for the evaluation of New York schools (including the Schools Under Registration Review process and the state standards required by the federal No Child Left Behind Act of 2001).

Accordingly, the order of the Appellate Division should be modified, without costs, by granting judgment declaring in accordance with this opinion and, as so modified, affirmed.

Rosenblatt, J. (concurring). I join the majority in its rationale *33 and result, but write separately to emphasize that my vote should not be construed as concluding that $1.93 billion, as adjusted, is necessarily the proper additional budgetary amount to provide New York City schools, or that $2.45 billion is the amount that should be budgeted statewide. These figures were determined by a commission designated by the State as reflecting the constitutional *minimum* for a sound basic education. I join the majority because I agree that Supreme Court should not have directed the referees' recalculation, considering that the state budget plan had already calculated the amount in a way that, as a matter of law, was not arbitrary or irrational.

That does not mean that the State is limited to the minimum, or "floor," of what it takes to provide a sound basic education. Judging by Governor Pataki's higher budgeting and the similarly heartening indications that Governor-elect Spitzer will continue in a direction higher than the minimum, there is every indication that the amounts dedicated will be well above the constitutional floor. When it comes to educating its children, New York State will not likely content itself with the minimum. Indeed, after this suit was initiated the State provided for an additional $9 billion investment in capital improvements for the City's schools. How much more it can and should spend, however, is a matter for the political branches, which will be free to avail themselves of the valuable work performed by the distinguished panel of referees.

I also emphasize, most importantly, that this lawsuit has consequences beyond New York City and that there are, no doubt, other school districts that should benefit from increased budgets. This requires a statewide approach that is also best left to the Executive and Legislature.

Chief Judge Kaye (concurring in part and dissenting in part). Recognizing that we have neither the authority, nor the ability, nor the will to micromanage education financing, in *Campaign for Fiscal Equity v State of New York* (100 NY2d 893, 925 [2003] [*CFE II*]) the Court demarcated standards that must be met, but left it to defendants to come into compliance, affording them more than a year to do so. Regrettably, our trust was misplaced. Today, more than three years later--and more than 13 years after this litigation began--defendants still have failed to fund the New York City public schools adequately. Having failed to satisfy their responsibility, defendants now compel this Court to **13 determine the specific steps that must be taken to remedy the undisputed constitutional violation. Also regrettably, *34 I must dissent because the majority does not resolve the inadequate funding of the New York City public schools and reaches a result that is well below what the governmental actors themselves had concluded was required.

Although the dollar differences that separate the majority and dissent are great, our actual points of difference are only two: first, the deference owed, and second, the rationality of two factors used by defendants to calculate the cost of a sound basic education. [FN1]

I. The Issue of Deference

The heart of the majority writing is that substantial deference is owed to the executive and legislative branches of government, particularly in matters of budgeting and policymaking (*see* majority op at 28-30). I agree wholeheartedly. When the Executive

and the Legislature have acted together on matters within their particular province, the courts should indeed tread lightly. That, however, is not what happened here. There is no state budget plan for bringing the schools into constitutional compliance; that is precisely the problem. When, as here, the Executive and the Legislature are specifically at odds as to the cost of providing the opportunity for a sound basic education to New York City schoolchildren, the approach of a single branch, rejected by another, cannot legitimately be considered "the State's estimate" (majority op at 29), and is entitled to no special weight.

In *CFE II* we directed defendants to ascertain the actual cost of providing a sound basic education in New York City; to ensure that every city school have the resources necessary to provide the opportunity for a sound basic education; and to ensure a system of accountability to measure whether the reforms actually provide the opportunity for a sound basic education. Although there is no dispute that defendants failed to comply with our second directive, I cannot agree with the majority that they complied with our first.

To be sure, the Governor, in undertaking to determine the cost of a sound basic education, and in proposing $4.7 billion in increased annual funding for the New York City public schools, took important steps toward that objective. And in most cases, of course, we can assume that the Governor, in whom the executive *35 power is vested, speaks for the State. But not so here. The enactment of an appropriation bill that ensures adequate educational funding **14 requires agreement among the Governor and both houses of the Legislature, and plainly that has not occurred. [FN2]

As the deadline for compliance approached, defendants advised the trial court, to which we had remitted the case, of the actions they had by then undertaken to satisfy this Court's order. Based on defendants' failure to fulfill the *CFE II* mandate, the court appointed three referees

> "to hear and report with recommendations on what measures defendants have taken to follow the *[CFE II]* directives and bring this State's school funding mechanism into constitutional compliance insofar as it affects the New York City School System. The referees shall also identify the areas, if any, in which such compliance is lacking."

Even today, it is hard to see what alternative the court had. The Executive and Legislature were at loggerheads--there was no agreed amount to be implemented.

The majority faults the trial court and referees for undertaking to determine the actual cost of a sound basic education, believing instead that calculations proffered by certain of the defendants should have been beyond question. For more than 200 years, however, it has been the province and duty of the judicial branch to enforce compliance with constitutional norms, including (when necessary) as against the other branches of government. Defendants' continued failure to cure the violation properly obligated the courts to determine the extent of noncompliance and to direct a remedy.

When courts undertake to resolve a controversy that others have brought before them, they appropriately resort to the tools of the judicial trade--testimony, evidence and fact-finding. The referees thus conducted seven days of evidentiary hearings on the primary question before them--the actual cost of a sound basic education for New York City schoolchildren. Based on the testimony of 15 witnesses, expert evidence, and extensive briefing *36 and argument, they rationally determined that the actual cost of providing a sound basic education in New York City required an annual increase in operational funding of $5.63 billion, calculated in 2004-2005 dollars. The Appellate Division, too, determined that constitutional compliance required additional annual expenditures of between $4.7 billion and $5.63 billion. The majority, however, rejects the findings of the referees, and indeed the very process undertaken by the courts, and instead accepts at face value $1.93 billion as sufficient to satisfy the Education Article.**15

The origins of that number are instructive. In response to our decision in *CFE II*, the Governor

established the New York State Commission on Education Reform--the Zarb Commission--charged with, among other things, "study[ing] and mak[ing] recommendations regarding . . . [t]he actual cost of providing all children the opportunity to acquire a sound basic education in the public schools of the State of New York" (Executive Order [Pataki] No. 131 [9 NYCRR 5.131]). The Commission, in turn, retained Standard & Poor's School Evaluation Services, which produced a lengthy Resource Adequacy Study offering a wide variety of possible amounts of education spending, each based on different assumptions and variables as to the desired level of educational achievement and the costs required to attain it.

Inasmuch as the Commission was asked to study statewide costs, even though this Court's mandate had been limited to New York City, Standard & Poor's used each scenario to calculate both statewide amounts and their citywide equivalents. With respect to New York City, Standard & Poor's calculated resource gaps--defined as the difference between the amount actually spent in the most recently completed fiscal year and the amount that would be required to fund the particular scenario--ranging from $1.93 billion to $7.28 billion in core operating expenditures. [FN3] In so doing, however, Standard & Poor's itself repeatedly made clear that it "does not recommend any spending level or the adoption of any particular achievement scenario" (Standard & Poor's School Evaluation Services, Resource Adequacy Study for the New York State Commission on Education Reform, at 23 [2004]). Relying on the Resource Adequacy Study, and specifically endorsing the "cost effectiveness" variable *37 considered by Standard & Poor's, the Commission similarly reported a wide range to the Governor--that is, from $2.45 billion to $5.57 billion statewide, which translated to between $1.93 billion and $4.69 billion for the City--concluding that "[t]he State's elected leaders should make a choice of funding within this range" (New York State Commission on Education Reform, Final Report, at 24 [2004]).

At no time did either Standard & Poor's or the Commission undertake to conclude that *any* particular amount within the proffered ranges was sufficient to ensure the opportunity for a sound basic education to all New York City schoolchildren (*see* Standard & Poor's School Evaluation Services, Resource Adequacy Study for the New York State Commission on Education Reform, at 12-13 [2004] ["Standard & Poor's does not recommend any particular spending level; nor does it define a 'sound, basic education' "]; New York State Commission on Education Reform, Final Report, at 24 [2004] ["The Commission believes the decision on which educational standard to use should be left to the State's elected leaders"]). Nevertheless, the majority accepts the calculations performed in the Resource Adequacy Study as **16 sacrosanct, and from there concludes that the lowest number reached using any possible combination of variables must equal the amount needed to provide a sound basic education.

Even defendants did not recommend these numbers. Rather, defendants, through the Attorney General, submitted to the referees an "education plan prepared by Governor Pataki setting forth his proposal for complying with the June 23, 2003 decision of the Court of Appeals in this action." The Governor's plan proposed additional annual operating funds for New York City of $4.7 billion, and $8 billion statewide. As the Attorney General wrote in a letter to the referees:

> "Governor Pataki is a named defendant in this action, and this office therefore is presenting the plan prepared by the Governor, as his counsel, and a description of that plan as prepared by the Governor's office. We also note, however, that the decision of the Court of Appeals requires the enactment of legislation by the State of New York, and this office is the institutional counsel for the State.
>
> "Unfortunately, the two houses of the Legislature and the Governor have not been able to agree upon a single unified plan for submission to this panel."

*38 On this record, the $1.93 billion figure is not entitled to special deference.

II. The Issue of Rationality

The $1.93 billion now embraced by the majority is,

moreover, based on two unsustainable factors. When those factors are properly adjusted, the resultant cost of a sound basic education, as calculated by Standard & Poor's, is identical to that reached by the referees and accepted by the trial court--a determination that should therefore be upheld as rationally based.

In conducting its study, Standard & Poor's, as instructed by the Commission, utilized the "successful schools and districts" model for calculating per-pupil expenditures--one of three distinct methodologies typically used by experts in education policy and finance. No party disputes the legitimacy of the successful schools method as a means for determining the cost of a sound basic education. By using this method, Standard & Poor's was able to calculate a range of numbers that varied according to choices made as to four distinct factors--first, the standard for measuring a successful school district; second, the additional expenditures necessitated by special needs students; third, the use of a cost filter; and fourth, the manner of converting "standardized" education dollars into New York City dollars.

With respect to the first factor, Standard & Poor's made a set of calculations using four different academic achievement standards for identifying a successful school district, and again the parties agree, and the referees found, that satisfaction of the Regents Criteria provides an appropriate standard for measuring a successful school. Nor is there any dispute as to the fourth factor--the proper conversion of state education dollars into New York City **17 dollars. Inasmuch as the purchasing power of a dollar varies across the state, and the successful schools method examined all of the school districts in the state, Standard & Poor's offered two alternative regional cost adjustment indices to determine the cost in New York City dollars: (1) the "New York Regional Cost Index," provided by the State Education Department; and (2) the "Geographic Cost of Education Index" (GCEI), provided by the National Center for Education Statistics. *39 The referees found, and the parties agree, that use of the GCEI was appropriate. [FN4]

The difference--a huge dollar difference--centers on the second and third factors: the proper weighting adjustments for special needs students, and the use of a 50% cost reduction filter.

A. The Low-Income Weighting

A successful schools analysis produces "base expenditures," which are estimated costs per pupil. However, such base expenditures must then be multiplied by "weightings" for students with special needs, who require such costly accommodations as differentiated curricula, smaller class sizes, assistive technology and classroom aides. Standard & Poor's assigned a weighting of 2.1 to students with disabilities (special-education students); 1.35 to economically disadvantaged students; and 1.2 to students with limited English proficiency. Although the parties and referees agree that the special-education and English-language weightings were appropriate, the record reflects that the 1.35 low-income weighting applied by Standard & Poor's--according to which $1.35 must be allocated to students in poverty for every dollar spent on a student not in poverty--was irrational and cannot be sustained.

Defendants' principal rationale for choosing this weighting--a choice that drew considerable criticism from the witnesses and amici--was that the Standard & Poor's study had identified 1.35 as the proper adjustment for educating economically disadvantaged students. But Standard & Poor's had in fact emphasized that 1.35 was simply a figure that it had "drawn from a review of research literature on the coefficients that education agencies tend to use in practice," and that "insufficient empirical evidence exists in New York to determine how much additional funding is actually needed for different categories of students with special needs to consistently perform at intended achievement levels" (Standard & Poor's School Evaluation Services, Resource Adequacy Study for the New York State *40 Commission on Education Reform, at 8-9 [2004]). [FN5] As a result, Standard & Poor's made clear that its study "does not explicitly recommend a particular set of weightings." (*Id.*)

Unlike Standard & Poor's, the Regents, in

determining that a higher poverty weighting was required, had focused on the specific circumstances of New York City schools, including an especially heavy concentration of high-needs students, very low graduation rates, large classes and a disproportionate number of schools in need of improvement, and thereby determined that the appropriate low-income weighting for New York City was 1.8. With respect to the state as a whole, the Regents recommended weightings for low-income students ranging from 1.5 to 2.0, depending on the concentration of poverty in the district.

Because the Standard & Poor's weighting of 1.35 for low-income students was not focused on the specific circumstances of New York City schools, its use to determine the actual cost of providing a sound basic education to economically disadvantaged New York City students was irrational, as the referees found. The referees thus properly determined that a poverty weighting of at least 1.5--the lower end of the range proposed by the Regents--must instead be used.

B. The 50% Cost Filter

Finally, as endorsed by the Zarb Commission, Standard & Poor's applied a "cost effectiveness filter" of 50% in an alleged effort to screen out successful school districts that either spent money inefficiently or spent more than was necessary to provide the opportunity for a sound basic education. Under that approach, Standard & Poor's considered the average expenditures of only the lower-spending half of successful school districts in New York State, thereby excluding from the analysis 140 of the 281 successful school districts meeting the Regents Criteria standard.

Multiple witnesses and amici heavily criticized this filter. Indeed, several testifying witnesses criticized the use of *any* cost reduction filter, and others would have used an approach substantially different from the one adopted by defendants, such as simply eliminating the highest- and lowest-spending 5% *41 of districts as "outliers." Defendants' own expert, Dr. Robert M. Palaich, testified that his own firm would not use the 50% filter, and there was no evidence offered that this filter is generally accepted by experts in educational finance or, more fundamentally, that the higher-spending districts that were excluded from defendants' analysis by the cost filter were in fact inefficient. Inasmuch as defendants made no attempt to determine why **18 some successful schools spent less per pupil than others, the assumption that this must have been because the lower-spending schools were more efficient is utterly speculative. Indeed, certain expert amici posited that the lower spending in the selected schools might instead have been due to low wage costs and a low concentration of disadvantaged students, not to efficiency.

Only one decisionmaker anywhere in the country--the New Hampshire Legislature--has ever implemented a 50% cost reduction filter. But as even defendants acknowledge, "in New Hampshire it appears that the efficiency factor was selected to drive costs down" to a predetermined amount; it was not based on the expertise of any education finance experts. The 50% number not only is wholly arbitrary, but also has the effect of eliminating most of the school districts in Westchester and Nassau, the two counties that border New York City and thus most resemble the City in the concentration of students who are not English proficient and in the higher regional costs, particularly in hiring and retaining capable teachers. Accordingly, the 50% cost filter was properly rejected by the referees.

Defendants nevertheless defend the use of the 50% filter on the ground that the State Board of Regents also used it in its own budget proposal, submitted to the referees. But if deference to the Regents is called for with respect to the cost filter, surely it must also be shown with respect to the appropriate poverty weighting. The Regents, as noted, recommended a weighting for New York City low-income students of 1.8. Application of a 1.8 low-income weighting-- even with the 50% cost filter--would result in a resource gap of $5.25 billion, almost identical to the $5.26 billion gap found by the referees. [FN6]

*42 Notably, the Governor proposed additional annual New York City spending of $4.7 billion; the

Regents proposed $4.7 billion from the State, plus $0.9 billion from the City, for a total of $5.6 billion; and New York City proposed $5.3 billion. Plainly, every governmental actor knew what the referees and the Appellate Division here concluded: A sound basic education will cost approximately $5 billion in additional annual expenditures. I remain hopeful that, despite the Court's ruling today, the policymakers will continue to strive to make the schools not merely adequate, but excellent, and to implement a statewide solution.

Judges Rosenblatt, Read and Smith concur with Judge Pigott; Judge Rosenblatt concurs in a separate opinion; Chief Judge Kaye concurs in part and dissents in part in another opinion in which Judge Ciparick concurs; Judge Graffeo taking no part.

**19 Order modified, etc.

FOOTNOTES

FN1. In a companion case, *City of New York v State of New York* (86 NY2d 286 [1995]), we affirmed the Appellate Division's dismissal of an action by the City of New York, the New York City Board of Education, the Mayor of New York City, and the Chancellor of the New York City School District, and held that these municipal plaintiffs lacked capacity to bring an action against the State.

FN2. S & P added a fourth approach, which identified 102 of the State's highest-performing school districts, measured on the basis of 15 indicators, including passing rates on state tests, graduation rates and high school enrollment retention rates.

FN3. Based on these S & P estimates and after reviewing the results of plaintiff CFE's New York Adequacy Study and the Board of Regents Proposal on State Aid to School Districts, the Zarb Commission recommended a five-year phase-in of a *statewide* amount of $2.5 billion to $5.6 billion from state, local and federal sources.

FN4. Specifically, the Appellate Division directed that

"in enacting a budget for the fiscal year commencing April 1, 2006, the Governor and the Legislature consider, as within the range of constitutionally required funding for the New York City School District, as demonstrated by this record, the proposed funding plan of at least $4.7 billion in additional annual operating funds, and the Referees' recommended annual expenditure of $5.63 billion, or an amount in between, phased in over four years, and that they appropriate such amount, in order to remedy the constitutional deprivations found in *CFE II*" (29 AD3d at 191).

FN5. Indeed this variation was the focus of *Board of Educ., Levittown Union Free School Dist. v Nyquist* (57 NY2d 27 [1982]); we held that the State's public school financing system did not violate the Equal Protection clauses of the state and federal constitutions, despite wide spending disparities among school districts.

FN1. I concur with the majority that no further judicial direction is required with respect to capital improvements or accountability.

FN2. Indeed, our State Constitution places the obligation to provide all the state's children with a sound basic education squarely on the Legislature: "The legislature shall provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated" (NY Const, art XI, § 1 [the Education Article]).

FN3. "Core operations" exclude debt service and capital and transportation spending.

FN4. However, the particular GCEI used by Standard & Poor's in its Resource Adequacy Study was outdated. Accordingly, as the majority recognizes and defendants concede, the $1.93 billion ordered by the Court must be adjusted using the correct GCEI.

FN5. Evidence in the record indicated that such nationally derived weightings generally "result from guesses or policy decisions based on the amount of available funding" and "are essentially arbitrary and

do not reflect the actual costs of providing adequate educational opportunities to students with special needs."

FN6. The $5.63 billion calculated by the referees reflected both the updated GCEI and an adjustment for inflation from January 2004 to 2004-2005 dollars. Without those corrections, this amount equated to the Standard & Poor's permutation that resulted in $5.26 billion. Indeed, all figures calculated by Standard & Poor's and proffered before the referees were measured in January 2004 dollars. As defendants concede, the $1.93 billion endorsed by the majority must be adjusted for inflation.

NY,2006.

CAMPAIGN v STATE OF NEW YORK

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EXHIBIT 7

COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT
DIVISION II
CASE NO. 03-CI-00055 AND 03-CI-01152

TYLER YOUNG, ET AL. PLAINTIFFS

V. OPINION AND ORDER

DAVID L. WILLIAMS, ET AL. DEFENDANTS
AND RELATED ACTION

****

This case is before the Court on Plaintiffs' and Defendants' Motions for Summary Judgment. The Court having considered the record, having heard the arguments of counsel, and being otherwise sufficiently advised makes the following findings:

I. BACKGROUND

A. Statement of the Case

The facts are generally uncontroverted. The parties' Motions for Summary Judgment rest on different interpretations of law. Plaintiffs claim that funding of Kentucky's common schools is inadequate and arbitrarily determined by the legislature. Defendants refute these allegations, but argue further that Kentucky's Constitution prohibits the judiciary from dictating to the legislature what levels of funding are appropriate and what process to use to determine how much funding education requires.

Plaintiffs' claims are closely intertwined. Plaintiffs state that an "essential and minimal" element of an efficient system of common schools is sufficient funding; "[t]he General Assembly shall provide funding which is sufficient to provide each child in Kentucky with an adequate education." *Rose v. Council for Better Educ.*, 790 S.W.2d 186, 213 (1989). Plaintiffs assert that Defendants fail to use any specific, systematic

method to quantify the amount of money necessary to provide an adequate system of common schools; therefore, defendants' determination of appropriate funding is arbitrary. Plaintiffs also claim that common school funding is inadequate because five costing-out studies found that an adequate education in Kentucky would cost significantly more than the amount currently appropriated by the General Assembly.

Plaintiffs argue that the education system in Kentucky is standards-based and the rational way to evaluate its adequacy involves 1) determining the resources necessary for a student to achieve the standards outlined in KERA, 2) determining the capital necessary to provide such resources, and 3) adding up the total cost of those resources. Plaintiffs further state that four suitable methodologies exist for measuring the capital that is necessary to provide a student with an adequate education. Those methods include professional judgment, successful schools, state of the art, and econometric. Plaintiffs claim that Defendants' failure to employ one of these or a similar method as a basis for common school funding necessarily makes the legislature's funding decisions unconstitutionally arbitrary.

Plaintiffs' further state that outside experts performed five "costing out" studies to evaluate the adequacy of Kentucky's schools. Those studies analyzed the financial requirements of educating Kentucky's children using the professional judgment, state of the art, and econometric methods. The results of the studies were simultaneously uniform and conflicting: each concluded that fulfilling Kentucky's constitutional mandate toward education would require significant more money than current funding levels, but disagreed as to the precise amount necessary. According to the studies, the General Assembly underfunded Kentucky schools by anywhere between $740 million to $2.3

billion for 2001 -2002 school year and $1.08 billion to $1.2 billion for the 2003-2004 school year. According to Plaintiffs, Defendants' failure to employ any of these "costing out" methods to calculate sufficient appropriations of an efficient education renders the school system financing unconstitutionally arbitrary and inadequate.

In addition to briefly addressing Plaintiffs' claims, Defendants introduced evidence of dramatic improvements in the performance of Kentucky students (Defs.' Mem. in Opp'n to Pls.' Mot. for Summ. J. 15-18, Jan. 17, 2006), and argue, therefore, this matter should be dismissed on the merits. The Defendants also maintain that Plaintiffs cannot proceed with the merits of this case because separation of powers represents a constitutional bar preventing the Court from possessing the power to coerce the General Assembly in discretionary, political matters. Defendants contend that Plaintiffs are asking the Court to exceed the rule from *Rose* by going beyond mere constitutional interpretation and stepping onto a slippery slope by stipulating the manner by which the General Assembly must carry out its responsibilities. Along those lines, Defendants argue that the General Assembly uses a systematic methodology[1] to determine the amount of funding necessary to create an adequate education system. (Defs.' Mem. in Opp'n to Pls.' Mot. for Summ. J. 56, Jan. 17, 2006). Furthermore, the Defendants argue that the judiciary may not instruct the General Assembly to use any particular method to calculate the amount of adequate funding. In short, Defendants' argument is easily summarized: the lawsuit is improperly before the Court because the Judiciary cannot coerce General Assembly to perform a discretionary function in such a specific manner.

[1] Essentially, this systematic methodology is the legislative process replete with hearings, committee meetings, closed-door deliberations, and political posturing.

B. Statement of the Law

1. Legal Standard for Summary Judgment

Both parties have moved for summary judgment. Summary judgment is appropriate when the court concludes there is no genuine issue of material fact for which the law provides relief. CR 56.03. Summary judgment should only be granted when the facts indicate that the nonmoving party cannot produce evidence at trial that would render a favorable judgment. *Steelevest, Inc. v. Scansteel Serv. Ctr., Inc.*, 807 S.W.2d 476, 480 (1991). The record must be viewed in light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in that party's favor. *Id.* "The inquiry should be whether, from the evidence of record, facts exist which would make it possible for the non-moving party to prevail. In the analysis, the focus should be on what is of record rather than what might be presented at trial." *Welch v. Am. Publ'g Co. of Ky.*, 3. S.W.3d 724, 730 (1999). Summary judgment should be granted only when it appears impossible for the nonmoving party to produce evidence at trial which would effect a favorable judgment. *Steelvest, Inc.* 807 S.W.2d at 482. Additionally, the existence of a dispositive Constitutional bar, such as the separation of powers argument forwarded by the defendants, may require this Court to grant of summary judgment, as this Court would lack the power to enforce the remedial measures the Plaintiffs request.

2. Legal Standard for Arbitrariness

Kentucky precedent allows for judicial interpretation of the arbitrariness of Legislative acts. The Kentucky Supreme Court held:

> Merely establishing a large administrative and legislative record does not entitle a legislature or administrative agency to declare an apple to be an

> orange. The record may be replete with expert testimony on similarities between the fruits; however, a legislature or administrative agency, regardless of the size of the record it establishes, cannot lawfully make such a declaration. To by legislative fiat declare an object to be something it is not is such an abuse of discretion as to be arbitrary.

Prestonia Area Neighborhood Ass'n v. Abramson, 797 S.W.2d 708, 712-13 (1990). In another case involving separation of powers and Ky. Const. 2, the Kentucky Court of Appeals stated:

> exercis[ing] arbitrary power, which is understood to be any act which does not accord with reason and which has no adequate determining principle. A legislative act must bear something more than a remote or fanciful relation to the realities. If that were not so, there might be discrimination and oppression without measure.

Kenton & Campbell Benevolent Burial Ass'n v. Goodpaster, 200 S.W.2d 120, 124 (1946) (citing *Lawton v. Stewart Dry Goods Co.*, 247 S. W. 14 (1923); *Goodpasture, Dir. Of Ins. V. Kenton & Campbell Benev. Burial Ass'n*, 129 S.W.2d 1033 (1939); *City of Jackson v. Murray-Reed-Slone & Co.*, 297 S. W. 2d 847 (1944); *Ware v. Ammon*, 278 S. W. 593 (1925); *Mugler v. Kansas*, 123 U.S. 623, 661 (1887); *City of Louisville v. Kuhn*,145 S. W. 2d 851 (1940)).

3. The Rose Decision—Adequacy and Equity in Kentucky's Schools

In the landmark case of *Rose v. Council for Better Education*, the Supreme Court of Kentucky interpreted and applied the General Assembly's constitutional requirement to provide an efficient public education. The Kentucky Constitution stipulates that "[t]he General Assembly shall, by appropriate legislation, provide for an efficient system of common schools throughout the state." KY. CONST. § 183. Compared to other states' educational, constitutional mandate, a plain reading of Ky. Const. 183 presents a weak education standard; however, the *Rose* Court's interpretation of Ky. Const. 183

dramatically increased the General Assembly's responsibility to common schools. Robert M. Jensen, *Advancing Education through Education Clauses of State Constitutions*, 1997 BYU EDUC. & L.J. 1, 41-42. The *Rose* Court expansively defined an "efficient" school system[2] and required the system provide students with seven capacities necessary for an "efficient" education.[3] The decision recognized that "the establishment, maintenance and funding of common schools in Kentucky is the sole responsibility of the General Assembly." *Rose* at 212. Further, in determining that Kentucky's system of schools were not "efficient" as required by Kentucky's Constitution, the Supreme Court acknowledged that "efficient" has two prongs: equity and adequacy.[4]

While bolstering the General Assembly's responsibility to the education system, the *Rose* Court reinforced the importance of separation of powers by indicating that Kentucky's "double barrel, positive negative approach" is among the strongest in the

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[2] The *Rose* Court defines efficient as "1. The establishment, maintenance and funding of common schools in Kentucky is the sole responsibility of the General Assembly. 2. Common schools shall be free to all. 3. Common schools shall be available to all Kentucky children. 4. Common schools shall be substantially uniform throughout the state. 5. Common schools shall provide equal educational opportunities to all Kentucky children, regardless of place of residence or economic circumstances. 6. Common schools shall be monitored by the General Assembly to assure that they are operated with no waste, no duplication, no mismanagement, and with no political influence. 7. The premise for the existence of common schools is that all children in Kentucky have a constitutional right to an adequate education. 8. The General Assembly shall provide funding which is sufficient to provide each child in Kentucky as adequate education. 9. An adequate education is one which has as its goal the development of the seven capacities recited previously." *Rose* 790 S.W.2d at 212.

[3] Under *Rose*, The seven capacities required by the definition of efficient include "an efficient system of education must have as its goal to provide each and every child with at least the seven following capacities: i. sufficient oral and written communication skills to enable students to function in a complex and rapidly changing civilization ii. sufficient knowledge of economic, social, and political systems to enable the student to make informed choices; iii. Sufficient understanding of governmental processes to enable the student to understand the issues that affect his or her community, state, and nation; iv. Sufficient self-knowledge and knowledge of his or her mental and physical wellness; v. sufficient grounding in the arts; vi. Sufficient training or preparation for advanced training in either academic or vocational fields so as to enable each child to choose and pursue life work intelligently; vii. And sufficient levels of academic or vocational skills to enable public school students to compete favorably with their counterparts in surrounding states, in academics, or in the job market." *Rose*, 790 S.W.2d at 213.

[4] "We have noted the overall inadequacy of our system of education.... We have recognized the great disparity that exists in education opportunities throughout the state. We have noted the great disparity and inadequacy, of financial effort throughout the state." *Rose* at 213.

nation, because it "*mandate[s]* separation among the three branches of government, . . . and specifically *prohibit[s]* incursion of one branch of government into the powers and functions of the other." *Rose*, 790 S.W.2d at 213 (citing *Legislative Research Comm'n v. Brown*, 664 S.W.2d 907, 912 (1984)); *see also Siebert v. Garrett*, 197 S.W. 455, 457 (1922). The Court further indicated that the judiciary should defer to the General Assembly's discretion when possible. *Rose*, 790 S.W.2d at 209. The Court analyzed Kentucky's Constitution and case law, however, and concluded that "the judiciary has the ultimate power, and the duty, to apply, interpret, define, construe all words, phrases, sentences and sections of the Kentucky Constitution as necessitated by the controversies before it." *Id.* Additionally, the Court claims, "In spite of any protestations to the contrary, we do not engage in judicial legislating. We do not make policy. We do not substitute our judgment for that of the General Assembly." *Id.* at 211. The Court acknowledges an unwillingness to pierce the separation of power doctrine.

In the end, the *Rose* holding directed the General Assembly "to recreate and redesign a new system" that would "guarantee to all children the opportunity for an adequate education." *Id.* at 213. The *Rose* Court recognized that "the framers of Section 183 emphasized that education is essential to the welfare of the citizens of the Commonwealth." *Id.* at 206. Indeed, based on this recognition, the *Rose* Court declared that "education is a fundamental right in Kentucky." But, it is noteworthy that the Court refused to tell the General Assembly how to specifically reform the system or the manner by which it should achieve adequacy. *Id.* Moreover, the Court did not indicate a time frame during which the *Rose* the education system should be in compliance with the definition of efficient. *Id.*

i. The Dissent of Justice Leibson in *Rose*

Justice Leibson's scathing dissent strongly opposes the majority.

> An actual controversy is one admitting of specific relief through a decree conclusive in character. A judicial pronouncement in the present case where there are public questions of the utmost importance but no such justiciable controversy will cause more problems than it will solve. Worse yet, it opens the doors of the courthouse to a host of new lawsuits by litigants seeking a forum to argue questions of public policy which are incapable of specific judicial resolution. In line with the legal truism that 'bad cases make bad law' we can expect this case to be cited as precedent in a new wave of litigation involving issues that should be debated in the forum of public opinion, and then legislated rather than litigated.

Id. at 223 (Leibson, J., dissenting).

Justice Leibson further concludes that *Rose* should fail due to separation of powers, because the claim falls "squarely within its description of a nonjusticiable case." *Id.* at 224. Justice Leibson describes the case and the majority's opinion as "an insolvable, nonjusticiable dilemma . . . [a] Pandora's box, an Opinion which at the same time declares everything unconstitutional and nothing unconstitutional." *Id.* Justice Leibson then details two elemental hurdles that should prevent the claim against the General Assembly. First, the General Assembly may not be sued for discretionary functions and second, it may not be sued because it is not a legal entity. *Id.* at 227. In Justice Leibson's words, "this is a lawsuit with no defendants . . . [and it] fails to meet this 'irreducible minimum' necessary to invoke judicial power." *Id.* It should be noted that this Court has not experienced the "new wave" of litigation foretold by Justice Liebson. Indeed, the "wave" has consisted of this solitary case before the Court.

ii. Legislative Response to *Rose*

Rose led the General Assembly to create and pass House Bill 940, otherwise known as Kentucky Education Reform Act (KERA). KERA provides a substantive

structure for education reform in Kentucky that outlines steps for reconstructing the system of common schools. KERA upholds and strengthens *Rose* by mandating the seven *Rose* capacities; (an eighth capacity was added in 2000.) Additionally, KERA includes 75 expectations that correspond to six learning goals, delineates minimum requirements for graduation from public schools, establishes standards for administrators and educators and students, outlines model curriculum, and provides finance provisions. KERA's success was nationally recognized and since KERA's inception, Kentucky schools have generally experienced dramatic increases in education success indicators.

Rose and KERA initiated a nationwide trend of state judicial evaluations of the constitutionality of education systems. During litigation, state legislatures were frequently named and required to defend the Constitutionality of the *results* of the education system. But, courts that declared their states' education systems unconstitutional generally reserved for the states' legislatures the determination of what to do about remedying their unconstitutional school systems. In Kentucky, the Court limited the *Rose* holding to constitutional interpretation and expressly declined to adjudge or order the General Assembly to undertake any specific discretionary acts.

4. *The Kentucky Constitution*

Just as the General Assembly is required to satisfy Ky. Const. 183 and provide for "efficient" schools, judicial actions must comport with Ky. Const. 27, Ky. Const. 28, and Ky. Const 43. Sections 27 and 28 of the Kentucky Constitution describe Kentucky's separation of powers,[5] which is quite strong. *See supra* p. 6. Ky. Const. 43 is

[5] "The powers of the government of the Commonwealth of Kentucky shall be divided into three distinct departments, and each of them be confined to a separate body of the magistracy, to-wit: Those which are legislative, to one; those which are executive, to another; and those which are judicial, to another." KY CONST. § 27. "No person or collection of persons, being of one of those departments, shall

Kentucky's free speech and debate clause, which guarantees that legislators "shall not be questioned in any other place" for "any speech or debate in either House."

We believe a quick tangent to address the Kentucky Supreme Court's recent decision in Baker v. Fletcher, 204 S.W.3d 589 (2006) is necessary. In a quodiblit following the holding in Baker, the Supreme Court proposed that Section 43 of Kentucky's Constitution represented a grant of absolute immunity to the legislature and its members. Instead of suing the President of the Senate and the Speaker of the House in their official capacities, based on Section 43, the Supreme Court suggests that the ministerial officers of the legislature—its clerks, sergeants at arms, and doorkeepers—are the proper parties to the suit. Some, following Baker, have suggested the Legislative Research Commission as the proper party in actions alleging improper legislative actions before this Court. Based on Baker, the legislative defendants in this suit ask to be dismissed from the case. In Baker, the plaintiffs challenged the constitutionality of an act of the Governor and legislative immunity was not an issue in the case. Therefore, while informative and intellectually interesting, we believe that the Supreme Court's analysis of the issue is nonbinding dicta.

The Kentucky Supreme Court's decision in Jones v. Kentucky Retirement Systems,[6] a unanimous decision of the Kentucky Supreme Court, represents the binding precedent in this case. In this case, which the dicta in Baker did not overrule, the Court refused to extend immunity to the President of the Senate and the Speaker of the House when they were sued in their official capacities. Similar to the present case, the plaintiffs in the Jones case sought declaratory relief, alleging that the legislature's actions ran afoul

exercise any power properly belonging to either of the others, except in the instances hereinafter expressly directed or permitted." KY CONST. § 28.

[6] Jones v. Kentucky Retirement Systems, 910 S.W.2d 710 (1995).

of Kentucky's Constitution. Also similar, the legislative defendants in Jones clearly asserted the immunity argument.[7] Citing to Philpot v. Patton,[8] the Jones Court stated, "[M]embers of the General Assembly are not immune from declaratory relief of this nature simply because they are acting in their official capacity." Jones at 713. Furthermore, the Court outlined the foundations that prohibit legislative immunity under our constitutional scheme:

> It would undermine and destroy the principle of judicial review to hold that the General Assembly could act with immunity, contrary to the Kentucky Constitution. Any such holding would leave citizens of this Commonwealth with no redress for the unconstitutional exercise of legislative power. This we will not do. There is no immunity here. Jones at 713.

In light of this clear holding—still good law in our Commonwealth—we cannot dismiss the legislative defendants in this matter based on dicta in the more recent Baker case.

II. ANALYSIS

We begin our analysis by noting the unique tensions confronting the Court in this case. On the one hand, the Kentucky Supreme Court has declared, "education is a fundamental right in Kentucky." *Rose* at 206. This case provides this Court with its first opportunity to review the ramifications of the *Rose* decision in the context of education, and we find the "fundamental right" language in *Rose* to be highly relevant. First-year law students learn that when governmental action affects a citizen's fundamental rights, the courts will apply a strict scrutiny standard of review. *Weiand v. Board of Trustees of Kentucky Retirement Systems*, 25 S.W.3d 88, 92 (Ky. 2000). The burden is on the

[7] Legislative defendants in the present case have attempted to distinguish this case from the Rose decision by arguing that the legislative defendants in Rose never asserted their immunity. The precedents in Jones and Philpot show an assertion of legislative immunity that the courts did not find extended to that situation—specifically, when legislators are sued in their official capacity for declaratory relief from an unconstitutional legislative act.

[8] Philpot v. Patton, 837 S.W.2d 491 (Ky. 1992).

government to show that the law is "narrowly tailored to serve a compelling state interest." *Id.* Education's status as a fundamental right in Kentucky requires this Court to be vigilant in reviewing legislative and executive action surrounding education.

On the other hand, as we have previously noted, the strict separation of powers provisions in Kentucky's Constitution require that judges stick to judging while legislators and executives must stick to legislating and executing, respectively. So, this Court finds itself in the precarious position of carefully scrutinizing the actions of the other branches of government while not usurping their powers or interfering with matters that lie exclusively within their prerogative.

A. Summary Judgment as to the Adequacy Claim

This case presents a problematic scenario because it is sound public policy to reinforce funding for Kentucky's schools, but it is axiomatic that the judiciary follow the Kentucky Constitution, especially because Kentucky's wall separating the three branches of government is strong and tall. *See also Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 239 (1995) (a United States Supreme Court case supporting protecting separation of powers as a "structural safeguard" in a lawsuit involving Kentuckians). Policy issues, for which the General Assembly is responsible, permeate school financing determinations. Yet, in many cases and in this case, Plaintiffs ask the court to push the limits of separation of powers and determine the adequacy of the specific amount of education funding. This is especially dubious and courts are less willing to stretch separation of powers when a Plaintiffs claim is based solely on financial issues and does not allege problems with the quality of a common school education. Furthermore, courts are frequently unwilling to deem one funding provision superior to another. Robert M.

Jensen, *Advancing Education through Education Clauses of State Constitutions*, 1997 BYU EDUC. & L.J. 34-35. The *Rose* decision blurs the lines of judicial responsibility in cases involving education and separation of powers because it simultaneously requires us to respect the separation of powers within our system of government while reviewing the laws with strict scrutiny. While this Court must follow the mandates of the Kentucky Constitution, it must also adhere to *Rose* and apply both to the facts of this case.

If this case presented a fact pattern parallel to *Rose*, the Court's decision would be quite predictable; the *Rose* interpretation of Ky. Const 183 is the law in Kentucky. The court would not grant summary judgment, and at trial, it would determine the adequacy of the *actual* education afforded to Kentucky children. However, this case is distinguishable from *Rose*. In *Rose*, the Plaintiff's grounded their claim in the inadequacy of the schools' output. The case was decided based upon evidence alleging that the Kentucky school system provided students a vastly inferior education, falling far short of "efficient." Specifically, the *Rose* Court noted, "[W]e are asked -- based solely on the evidence in the record before us – if the present system of common schools in Kentucky is "efficient" in the constitutional sense. It is our sworn duty, to decide such questions when they are before us by applying the constitution." *Rose*, 790 S.W.2d at 209. The *Rose* Court did not make precise policy determinations such as the appropriateness of specific monetary allocations. This case alleges inadequate monetary expenditures, not an education system that is inadequate. Despite Plaintiffs' claim to the contrary, the *Rose* Court's definition of efficient requires funding to produce an adequate education, and does not allow for defining adequacy solely in terms of appropriations. Along those lines, the eighth requirement of an efficient education in Rose is, "[t]he

General Assembly shall provide funding which is sufficient to provide each child in Kentucky as adequate education." *Rose*, 790 S.W.2d at 212.

In the case at hand, Plaintiffs produce no evidence relating to the actual nature of school system inadequacy or poor student performance. In fact, Defendants provide the only evidence as to the output of the public school system, and that evidence indicates that General Assembly has created a system of common schools with tremendously enhanced results. The only evidence proffered by Plaintiffs is that studies using specific methodologies indicate that an adequate school system costs more than Kentucky spends on education, but all five studies produced quite different results. Based on these studies, the Plaintiffs ask the Court to declare the General Assembly's funding of education inadequate. Further, Plaintiffs ask the Court to order the General Assembly to adopt a new methodology to determine adequacy.

The requested remedial action is specific and similar to the kind of judicial oversight that *Rose* disallows. *See Rose*, 790 S.W.2d at 193. This Court finds Justice Leibson's dissent very persuasive; "even had we the power to order the General Assembly to enact new or different legislation on the subject of school financing or management of the public school system, it is beyond our power to suggest what the remedial legislation should be." *Rose*, 790 S.W.2d at 223 (Leibson, J., dissenting). Thus, it is unconstitutional for the Court to substitute the consultants' approximations of adequate appropriations, which were inconsistent when compared with one another, for the General Assembly's actual appropriations. *Rose* is different from the case at hand because the Plaintiffs in *Rose* asked the Court to review whether the output of Kentucky's educational system passed constitutional muster. In this case, the Plaintiffs are asking

adequacy to be determined based on an *input* standard. We are unwilling to extend *Rose* in this direction. Our reading of *Rose* indicates to us that the sole power reserved for this Court lies in declaring whether or not current funding levels are adequate to achieve the goals mandated by the Kentucky Constitution as enumerated in *Rose*. The determination of adequacy must be based on objective outputs, such as the CATS testing scores and our performance relative to neighboring states. These output measures indicate that Kentucky is making substantial progress toward its educational goals. *See* Defendant's Memorandum in Opposition to Plaintiff's Motion for Summary Judgment and in Support of Defendant's Cross-Motion for Summary Judgment, pp. 11-20. Given this progress, we are unwilling at this time to declare that the level of education funding in Kentucky is unconstitutionally inadequate.

This Court's ruling does not indicate that the General Assembly is not required to comport with *Rose* or Ky. Const. 183; Plaintiffs' claims fail to produce evidence of a constitutional shortcoming as to any actual inadequacy of a Kentucky common school education. The determination of whether a constitutional standard is met falls solely within the province of the judicial branch and this case would proceed if the actual adequacy of common school education were in question. Therefore, the Court clearly has the authority and power to interpret the Kentucky Constitution; however, Plaintiffs must bring appropriate claims before the Court. This Court is not willing to begin sliding down the slippery slope suggested by the Plaintiffs of ordering the legislature to adopt a different methodology.

Rose instructs the General Assembly to fashion a remedy using its discretion, and while the Court may evaluate the effectiveness of the remedy, separation of powers

prevents the Court from mandating specific means by which the General Assembly shall enact the remedy. In this decision, the judiciary in no way relinquishes the duty or responsibility to determine the actual adequacy of schools. If the output of Kentucky's schools begins to flay, the Court must examine whether the shortcoming approaches a breach of the Constitution. However, in this case, the Plaintiffs have shown no such actual inadequacy, and the Court will not dig a tunnel underneath the wall mandated by the separation of powers doctrine in Kentucky's Constitution, even for the noble goal of increasing educational funding.

B. Summary Judgment as to the Arbitrary Claim

Kentucky precedent clearly allows for judicial determinations of the arbitrary nature of the General Assembly's actions. Simply because the legislature is charged with making laws doesn't mean that this Court has no authority to review those laws to determine whether they are arbitrary. *Prestonia Area Neigborhood Ass'n v. Abramson*, 797 S.W.2d 708 (1990).

1. Arbitrariness in the General Assembly's Method of Determining Educational Funding Levels

The summary judgment standard requires this Court to determine whether facts exist which make it at all possible for Plaintiffs to prevail. If so, summary judgment is inappropriate. In this case, the Plaintiffs claim that the Defendants have failed to determine the cost of providing an adequate education by using certain methods of determining the adequacy of education. They argue the failure to use a scientifically-based methodology to determine the adequacy of the education money demonstrates that the manner of funding is arbitrary. Defendants claim that the General Assembly's manner of determining appropriate funding includes numerous committees and

subcommittees and is informed, rational, and systematic. We do not know why, despite over a decade of requests from interested citizen groups and the Office of Educational Accountability, the General Assembly has yet to commission a study of its own to determine whether its funding levels for education are adequate. Perhaps it regards the costing-out methodologies to be junk science; perhaps it is afraid of the results that study will produce. This failure is especially puzzling considering the General Assembly's charge to "monitor [the education system] on a continuing basis so that it will always be maintained in a constitutional manner.

However, we do not believe it is the role of the judiciary to tell the legislature that they must use a certain method or choose from a menu of methods to determine what level of funding is adequate under Kentucky's Constitution. Here, the legislature has argued that the output measures of Kentucky's educational system (and the improvement they show) demonstrate that the funding levels are not arbitrary. That is, the legislature has chosen the system's output measures as its "adequate determining principle." We believe this to be a constitutional measuring stick. In short, if the funding levels are adequate (i.e. they promote ever-increasing achievement in Kentucky's students), then they will necessarily not be arbitrary.

2. *Arbitrariness in Equity—The SEEK Formula*

The Plaintiffs in this case also pled that, "[t]he General Assembly has breached its constitutional obligation to provide an equal and substantially uniform system of common schools throughout the state." Complaint, 03-CI-55, p. 7. In support of this allegation, the Boards of Education in three northern Kentucky school districts filed an *amicus curiae* brief outlining the purported inequities within the Commonwealth's

system of funding public education through the Support Education Excellence in Kentucky (SEEK) formula. The *amici* allege that the SEEK formula, over time, has the effect of requiring property-rich[9] districts to shoulder an ever-increasing share of the cost of educating its pupils.[10] They argue this consequence runs afoul of the constitutional mandate in *Rose* that Kentucky provide a system of public schools that is both adequate and equitable. As the *Rose* Court stated, "[t]he system of common schools must be adequately funded to achieve its goals. The system of common schools must be substantially uniform throughout the state. ... *This obligation cannot be shifted to local counties and local school districts.*" *Rose* at 211, emphasis added.

We return to the idea that education in this state is a fundamental right. *Rose* at 206. As a fundamental right, statutes affecting education must stand up to strict scrutiny. That is, the law must be narrowly tailored to accomplish a compelling public interest. Clearly, educating young Kentuckians is a compelling public interest, as is devising a scheme by which state education funds can be equitably distributed among the school districts. The question here is whether the SEEK formula, as it operates today, is tailored narrowly enough to that compelling public interest to survive strict scrutiny. As a challenge to the arbitrariness of the legislature's action, we will review whether the legislature's determining principle was adequate enough to narrowly tailor the SEEK

[9] By "property-rich" we mean those districts whose property assessments grow at a rate of more than 4% a year.

[10] "The dramatic cut in state funding for these districts is clearly illustrated by the revenue per pupil data on the Kentucky Department of Education's website. In the 1990-1991 school year the state's contribution to the Boone County budge was 56.4%, and in 2004-2005 it had fallen to only 31.5%. At Beechwood, the 1990-991 state contribution was 51.4% and only 34.7% in 2004-2005. In F. Thomas, the state contributed 56.5% in 1990-1991 and only 33.6% in 2004-2005." Memorandum in Support of Motion for Leave to File Amicus Curiae Brief on Behalf of the School Boards of Beechwood Independent, Boone County and Ft. Thomas Independent, p. 2.

formula to the compelling public interest of equitably dividing Kentucky's education funds.

We believe it is within our power to declare the SEEK formula as it operates today unconstitutional if it effectively shifts the constitutionally prescribed burden of funding Kentucky's educational effort from the state to certain property-rich districts. Though we measure adequacy by output standards, we measure equity by input standards. If the SEEK formula is not narrowly tailored to further a compelling public interest, it is unconstitutional. However, this issue was addressed only in an *Amicus Curiae* brief that, while accompanied with compelling examples of alleged inequity, was unsupported by any sworn testimony. Absent a more specific allegation in the Complaint and sworn proof in evidence, this Court cannot reach the issue of the constitutionality of the SEEK Formula as it operates in Kentucky today.

III. CONCLUSION

At this time, this Court does not find that the level of funding for Kentucky's schools is so inadequate that it amounts to a violation of Section 183 of the Constitution. This Court agrees with the Plaintiffs that more funding for education is a good idea. We also agree that education should be the legislature's exclusive first priority. Distinguished public education is vital to Kentucky's ability to continue to create communities in which people find meaning in their places of work, respite, and worship. While permitting this case to move forward could result in an increasingly competent system of common schools, it must fail because "providing opportunities at the expense of the integrity of the judicial process is not a traditional item on the judicial agenda, nor...an appropriate role for the courts." *Rose*, 790 S.W.2d at 229 (Leibson, J.,

dissenting). Ultimately, increases in education funding must be the product of political will, not judicial decree.

Obviously, this ruling does not preclude the unsavory possibility that sometime in the future education funding in Kentucky will be so inadequate that it rises to the level of a constitutional infirmity. However, in the absence of objective evidence of shortcomings in Kentucky's educational system, finding a constitutional violation in this case would be exactly the "judicial legislating" in which the *Rose* Court declined to participate. This Court will leave the legislating to the legislature and hope that the citizens of Kentucky fortify it with the will to strengthen education for future generations of Kentuckians. Nearly 17 years ago, our legislators took an important step forward for the future of this Commonwealth. As citizens, we applaud them for this. KERA has produced dramatic progress toward excellence in public education. We GRANT Defendants' Motion for Summary Judgment on this issue.

While material issues of fact exist[11] in the debate surrounding the alleged arbitrariness of the legislature's methods, we believe the separation of powers doctrine bars us from mandating a specific procedure or formula for the General Assembly to follow to determine how and at what level to fund education. Further, we believe the legislature's reliance on objective measures of progress to be a constitutional basis upon which to exercise their legislative discretion. Therefore, we GRANT Defendant's Motion for Summary Judgment on this aspect of the arbitrariness issue.

The parties have neither pled nor briefed the issue of the alleged arbitrariness of the SEEK formula with the thoroughness necessary to allow this Court to reach the merits

[11] Specifically, questions of fact exist as to the reliability and accuracy of some of the "costing out" methodologies promoted by the Plaintiffs.

of the argument. The Court has heard no sworn proof on this issue. Should the Amici desire a ruling on the merits of their argument, they must file a separate action.

ACCORDINGLY, IT IS HEREBY ORDERED that **DEFENDANTS'** Motion for Summary Judgment is **GRANTED.**

This is a **FINAL** and **APPEALABLE** order. **SO ORDERED**, this 13th day of February, 2006.

Thomas D. Wingate, Judge
Franklin Circuit Court
Division II

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EXHIBIT 8

2007 OK 30

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

Oklahoma Education Association; Independent School District No. I-07 of Rogers County, Oklahoma, a/k/a Foyil Public Schools; Independent School District No. I-41 of Oklahoma County, Oklahoma, a/k/a Western Heights Public Schools; and Independent School District No. I-05 of Tulsa County, Oklahoma, a/k/a Jenks Public Schools,	FOR OFFICIAL PUBLICATION
Plaintiffs/Appellants,	
v.	No. 103,702
State of Oklahoma, *ex rel.* The Oklahoma Legislature; Senator Mike Morgan, In His Official Capacity as President Pro Tempore of the Oklahoma State Senate; and Representative Todd Hiett, In His Official Capacity as Speaker of the House of Representatives of the Oklahoma Legislature.	
Defendants/Appellees.	

ON APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY
THE HONORABLE DANIEL L. OWENS, PRESIDING

¶0 Plaintiffs brought suit against the State of Oklahoma and its legislative leaders asking the court to declare that the Oklahoma Legislature has failed to adequately fund common education in violation of Okla. Const. art. I, § 5 and art. XIII, § 1, and has failed to fund the State Public Common School Building Equalization Fund in violation of Okla. Const. art. X, § 32. The plaintiffs assert that by its failure to adequately fund common education, the Legislature has violated Oklahoma students' constitutional rights to a uniform, adequate education and has injured the plaintiffs because the funding is insufficient for them to provide a basic, adequate education as established by statutory standards. The defendants filed motions to dismiss. The district court granted the motions and dismissed the suit with prejudice finding (1) the plaintiffs lack standing, (2) the issues present non-justiciable political questions, (3) a judicial determination of the issues would violate the separation of powers provisions of the Oklahoma Constitution, and (4) the legislative leaders are immune from suit. This Court retained the appeal.

AFFIRMED.

Joe E. White, Jr., White & Weddle, P.C., and Richard Bryan Wilkinson, Oklahoma Education Association, Oklahoma City, Oklahoma, for the appellants.

Neal Leader, Senior Assistant Attorney General, and Martha R. Kulmacz, Assistant Attorney General, Office of the Oklahoma Attorney General, Oklahoma City, Oklahoma, for the appellee the Oklahoma Legislature.

Cheryl Purvis, Oklahoma State Senate, and Lee Slater, Oklahoma City, Oklahoma, for the appellee Senator Mike Morgan, President Pro Tempore of the Oklahoma Senate.

Amy Alden and Jennifer J. Butts, Oklahoma House of Representatives, Oklahoma City, Oklahoma, for appellee Representative Todd Hiett, Speaker of the Oklahoma House of Representatives.

TAYLOR, J.

I. ISSUES

¶1 The questions before this Court are (1) have the plaintiffs alleged sufficient facts to show that they have standing to assert violations of the rights of Oklahoma students based on the Oklahoma Constitution, (2) do the plaintiffs have a constitutional and statutory duty to provide Oklahoma's students with a basic, adequate education, and (3) do the substantive issues before for this Court present a non-justiciable, separation of powers question. We answer the first two questions in the negative and the third question in the affirmative.

II. STANDARD OF REVIEW

¶2 This appeal presents only questions of law. This Court reviews questions of law under a *de novo* standard[1] and without deference to the lower court.[2]

III. PROCEDURAL HISTORY

¶3 The Oklahoma Education Association (OEA) and three school districts, Foyil,[3] Western Heights,[4] and Jenks[5] (plaintiff school districts), brought suit against

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[1] *Rogers v. Dell Computer Corp.*, 2005 OK 51, ¶ 18, 138 P.3d 826, 381.

[2] *Gladstone v. Bartlesville Indep. Sch. Dist. No. 30*, 2003 OK 30, ¶ 5, 66 P.3d 442, 445.

[3] Foyil Public Schools is also known as Independent School District No. 1-07 of Rogers County, Oklahoma.

[4] Western Heights Public Schools is also known as Independent School District No. 1-41 of Oklahoma County, Oklahoma.

[5] Jenks Public Schools is also known as Independent School District No. 1-05 of (continued...)

the Oklahoma Legislature; Senator Mike Morgan, in his official capacity as President Pro Tempore of the Oklahoma State Senate; and Representative Todd Hiett, in his official capacity as Speaker of the Oklahoma House of Representatives. The OEA stated that it was bringing the suit in its corporate capacity and on behalf of its individual members and the students they serve. The members of the OEA are employees of Oklahoma school districts. The plaintiff school districts likewise stated that they were bringing the suit on their own behalf. However, no Oklahoma students are parties to this suit.

¶4 The plaintiffs challenge the current level of funding for common education. In their amended petition, the plaintiffs alleged the defendants, by inadequately funding education, are (1) depriving Oklahoma school children of a constitutional right to a uniform opportunity to receive a basic, adequate education according to the standards set by the Oklahoma Legislature and (2) depriving Oklahoma school districts of the ability to fulfill their constitutional and statutory obligations to meet the contemporary educational standards established for every child.

¶5 In the plaintiffs' five claims for relief, they seek a declaration that the Legislature's failure to adequately fund common education violates article I, section 5;[6] article X, section 32;[7] article XIII, section 1;[8] and article II, section 7[9] of the

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[5] (...continued)
Tulsa County, Oklahoma

[6] Article I, section 5 of the Oklahoma Constitution provides:

> Provisions shall be made for the establishment and maintenance of a system of public schools, which shall be open to all the children of the state and free from sectarian control; and said schools shall always be conducted in English: Provided, that nothing herein shall preclude the teaching of other languages in said public schools.

[7] Article X, section 32 provides:

> For the purpose of providing buildings for school districts, there is hereby established a State Public Common School Building Equalization Fund in which shall be deposited (1) such monies as may be designated or provided for such purpose by the Legislature, other than ad valorem taxes, and (2) the proceeds of all property that shall fall to the State by escheat and penalties for unlawful holding of real estate by corporations; provided, that if (continued...)

Oklahoma Constitution. They posit that the Legislature's alleged inadequate funding has deprived educators of the opportunity to provide a basic, adequate education to Oklahoma's children, denied Oklahoma students the right to a uniform, basic education, and violated the students' due process and equal protection rights. The plaintiffs also seek a declaration that the unfunded cost of meeting statutory educational standards exceeds one billion dollars and the unfunded capital needs of Oklahoma school districts exceeds three billion dollars. The plaintiffs ask the court to order the Legislature to design, formulate, adopt, properly and adequately fund, and maintain a comprehensive system of educational funding which affords each child in Oklahoma an equal opportunity for a basic, adequate education and to retain jurisdiction in this matter until the Legislature has implemented such an educational funding system.

¶6 The defendants moved for dismissal on several grounds. The two dispositive grounds are (1) the plaintiffs lack standing and (2) the petition presents a non-justiciable political question which is closely tied to the separation-of-powers doctrine.

IV. STANDING

¶7 The burden is on the party invoking a court's jurisdiction to establish its

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[7] (...continued)
such disposition and use of money from any such sources shall be declared invalid, the validity of other provisions of this section shall not be affected thereby. The State Public Common School Building Equalization Fund shall be administered by the State Board of Education, until otherwise provided by the Legislature. Such Fund shall be used to aid school districts in acquiring buildings, under such regulations as may be prescribed by the administering agency, unless otherwise provided by law, and the amount paid therefrom to or for any school district shall be determined by a formula established by the Legislature. The administering agency is authorized to accept grants-in-aid from the federal government for building purposes.

[8] Article XIII of the Oklahoma Constitution deals with education. Section 1 provides: "The Legislature shall establish and maintain a system of free public schools wherein all the children of the State may be educated."

[9] Article II, section 7 of the Oklahoma Constitution provides: "No person shall be deprived of life, liberty, or property, without due process of law."

standing to seek relief in the court.[10] To establish standing, the plaintiff must show (1) a concrete, particularized, actual or imminent injury in fact, (2) a causal connection between the injury and the alleged misconduct, and (3) a protected interest "within a statutorily or constitutionally protected zone."[11]

¶8 We decipher two injuries which the plaintiffs assert have resulted from the Legislature's alleged failure to adequately fund Oklahoma's educational system. First, students are harmed because they are deprived of a uniform, basic, adequate education, of their rights to due process, and of their rights to equal protection of the law, all mandated by the Oklahoma Constitution. Second, the OEA's members and the plaintiff school districts are harmed because they are unable to meet their constitutional and statutory duties as educators. We first address the OEA's and the plaintiff school districts' standing to challenge the alleged constitutional deprivations to Oklahoma's students.

¶9 The OEA claims associational standing to seek relief on behalf of Oklahoma's students and on behalf of its members based on its members' standing[12]. An association has standing to seek redress for injury on behalf of its members when "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit."[13]

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[10] *Toxic Waste Impact Group, Inc. v. Leavitt*, 1994 OK 148, ¶ 8, 890 P.2d 906, 910.

[11] *Indep. Sch. Dist. No. 9 v. Glass*, 1982 OK 2, ¶ 10, 639 P.2d 1233, 1237.

[12] OEA does not claim any injury in its own right which would show that it has standing aside from associational standing to bring this suit. The OEA seems to assert that its members have standing as taxpayers and citizens but fails to provide any argument or support in its briefs for this position. Thus OEA's position that it has standing because its members have standing as taxpayers and citizens is deemed abandoned. *Okla. City Urban Renewal Auth. v. Oklahoma City, Oklahoma*, 2005 OK 2, n. 9, 110 P.3d 550, 555 n. 9.

[13] *Okla. Pub. Employees Ass'n. V. Okla. Dept. of Cent. Serv.*, 2002 OK 71, ¶ 9, 55 P.3d 1072, 1077.

A. Standing to Assert Injury to Oklahoma Students

¶10 When ruling on a pretrial motion to dismiss for lack of standing, the trial court, and subsequently the reviewing court, "must construe the petition in favor of the complaining party."[14] If the plaintiff alleges facts which are sufficient to establish standing, then the case proceeds to the next stage.[15] A party's standing may be examined at any stage of the proceedings, and the party seeking relief has a greater burden at later stages in the case than in defending a pretrial motion to dismiss.[16]

¶11 The OEA asserts that it has standing as an association based on its members possessing standing to sue in their own right. For the OEA to have associational standing, its members must have a "'direct, immediate and substantial'" interest in the controversy and a "personal stake in the outcome."[17] In this respect, its members' injuries must be to their own legal rights and not those of others.[18] With few exceptions,[19] "constitutional rights are personal and may not be asserted vicariously."[20]

¶12 The plaintiffs assert injury to the rights of Oklahoma's students. The OEA has not established that any of its members are Oklahoma students. Although some of the members of the OEA may be parents of Oklahoma students, this is insufficient to establish the OEA's standing to assert injury to the students' rights. The OEA has failed to meet its burden to show that any of its members have a right of their own

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[14] *Indep. Sch. Dist. No. 9 v. Glass*, 1982 OK 2 at ¶ 10, 639 P.2d at 1237.

[15] *Id.*

[16] *Toxic Waste Impact Group, Inc.*, 1994 OK 148 at ¶ 8, 890 P.2d at 910.

[17] *Hendrick v. Walters*, 1993 OK 162, ¶ 5, 865 P.2d 1232, 1237.

[18] *Id.*, at n. 14, 865 P.2d at 1236, n. 14.

[19] The most serious, countervailing policies may provide exceptions to this rule. *Forest Oil Corp. v. Corp. Comm'n of Okla.*, 1990 OK 58, ¶ 31, 807 P.2d 774, 788. The United States Supreme Court has stated an exception when non-parties may suffer injury from the outcome but have no effective way to preserve their rights. *See Broadrick v. Oklahoma*, 413 U.S. 601, 611 (1973). Another exception is where a statute has been challenged as violating the First Amendment for facial overbreadth. *Id.* at 611-614.

[20] *Broadrick*, 413 U.S. at 611; *Forest Oil Corp. v. Corp. Comm'n of Oklahoma*, 1990 OK 58, ¶ 31, 807 P.2d 774, 788.

to assert injury to the rights of Oklahoma's students. As the OEA's members cannot vicariously assert injury to the constitutional rights of Oklahoma's students, neither can the OEA. The OEA has failed to meet the first prong of the test for associational standing as to this claim.

¶13 The OEA relies on the fact that in *Oklahoma Education Association v. Nigh,*[21] an original action before this Court, it was allowed to assert that the Oklahoma State Land Office was violating its constitutional duty by giving preferential leases for certain lands contained in the Oklahoma School Land Trust. This Court is not bound by its exercise of jurisdiction in *Nigh* because the OEA's standing passed without mention in that case.[22]

¶14 The plaintiff school districts fail to allege facts which support their standing to assert the rights of all Oklahoma students. They allege: "[S]tudents enrolled in Oklahoma school districts are denied their fundamental right to a basic, adequate education as required by the Oklahoma Constitution." The plaintiff school districts have not alleged that any of their students are failing to receive a basic, adequate education, *i.e.* that any of their students have been injured. The plaintiff school districts have failed to present us with any authority to show that they have standing to assert the violation of the constitutional rights of students generally across this state.[23]

¶15 Generally, this Court will not address the constitutionality of a legislative act, and similarly a failure to act, until presented with a proper case in which it appears the complaining person has been or is about to be denied a right or

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[21] 1982 OK 22, 642 P.2d 230.

[22] *See United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 38 (1952). OEA alleges that one of its strategic objectives "is to secure commitment to the intrinsic value of public education in Oklahoma, promote public education as a basic right and increase Oklahoma's financial investment in public schools." While this is a lofty objective, we question whether OEA's attempt to represent students for additional educational funding does not directly conflict with the OEA's role in representing school employees for salary and benefits increases before the Oklahoma Legislature and school boards.

[23] *See Broadrick*, 413 U.S. at 611; *Forest Oil Corp. v. Corp. Comm'n of Oklahoma*, 1990 OK 58, ¶ 31, 807 P.2d 774, 788.

privilege to which the person is lawfully entitled.[24] The parties here have not alleged facts which show that they are the proper parties to bring this suit.

B. Standing to Assert Harm to the Plaintiff School Districts and to OEA Members

¶16 The plaintiffs allege that the plaintiff school districts must comply with unfunded or partially-funded legislative mandates or risk sanctions or other penalties. When a party does not rely on a particular statute or constitutional provision authorizing suit, the question of standing depends on whether the party has "alleged a personal stake in the outcome of the controversy."[25] In this case, the plaintiff school districts and OEA have alleged that the school districts may be sanctioned or penalized for failure to comply with legislative mandates caused by their receiving insufficient funds to do so.

¶17 Without pointing to any specific provision, the plaintiffs assert that school districts and teachers are constitutionally and statutorily required to provide students with a uniform, adequate education. Article XIII, section 1 and article I, section 5 of the Oklahoma Constitution imposes on the Legislature the duty to "establish and maintain a system of free public schools." The school districts and their boards are but the vehicles which the Legislature uses to carry out this constitutional duty.[26] A school board's powers and duties are restricted to those expressly granted, fairly implied, necessarily incidental to the express powers, or essential to its declared objects and purposes.[27] We do not find that either of these two constitutional provisions places any duty on local school districts, school boards, or school employees to maintain or establish public schools, and the plaintiffs have failed to point to any. Simply, the plaintiffs have failed to allege any facts that would support a finding that the plaintiff school districts or OEA's members have an interest which

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[24] *Bradbury v. Okla. State Bd. of Chiropody*, 1971 OK 130, ¶ 10, 490 P.2d 246, 248.

[25] *Indep. Sch. Dist. No. 9 v. Glass*, 1982 OK 2 at ¶ 8, 639 P.2d at 1237.

[26] *Consol. Sch. Dist. No. 1 v. Wright*, 1927 OK 474, ¶ 37, 261 P. 953, 957.

[27] *Bd. of Educ. v. Cloudman*, 1939 OK 297, ¶ 23, 92 P.2d 837, 841.

is within a constitutionally protected zone, the third prong of the test for establishing standing.[28]

V. Political Question

¶18 Even though the plaintiffs do not have standing to assert the violation of the constitutional rights of Oklahoma students, we address whether we are presented with a non-justiciable political question. Generally, a motion to dismiss a petition is without prejudice and subject to leave to file an amended petition.[29] However, the district court in this case dismissed the petition with prejudice. We address the political question issue because we are presented with a public law question concerning educational and fiscal policy, the district court ruled that the suit presented non-justiciable political question, and it would be futile to return this case to the district court when we deem it to present a non-justiciable political question.

¶19 Our state's constitution divides governmental powers among the three branches of government. The Oklahoma Constitution at article IV, section 1 states:

> The powers of the government of the State of Oklahoma shall be divided into three separate departments: The Legislative, Executive, and Judicial; and except as provided in this Constitution, the Legislative, Executive, and Judicial departments of government shall be separate and distinct, and neither shall exercise the powers properly belonging to either of the others.

This provision prohibits one branch of the government from controlling or subjecting another branch to coercive influences either directly or indirectly.[30]

¶20 Except for the reservation of the power of initiative and referendum, the

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[28] This leaves the issue of whether this Court has the authority to direct fiscal legislation to adequately fund statutory mandates placed on local school districts. This issue calls into question the express constitutional commitment of fiscal policy issues to the Legislature. The plaintiffs admit in their brief "that the Oklahoma Legislature is free to exercise its 'legislative discretion' and ignore legislatively enacted goals for the improvement of public education" and we agree.

[29] *See* 12 O.S.2001, §§ 2012(G), 2017.

[30] *In re Okla. Dept. of Transp. for Approval of not to Exceed $100 Million Okla. Dep't of Transp. Grant Anticipation Notes, Series 2002*, 2002 OK 74, ¶ 8, 64 P.3d 546, 549; *see O'Donoghue v. United States*, 289 U.S. 516, 530-531.

state's policy-making power is vested exclusively in the Legislature.[31] The Legislature's policy-making power specifically includes both public education and fiscal policy.[32]

¶21 The Oklahoma Constitution charges the Legislature with the duty of establishing a public school system.[33] "The method employed by [the Legislature] to discharge the burden thus imposed is largely within its discretion."[34] "The determination of the policy to be pursued in matters of enactment of legislation to discharge its constitutional responsibility to the people in matters of education is a question that rests solely with the Legislature."[35]

¶22 In *Fair School Finance Council of Oklahoma, Inc. v. State*,[36] this Court was asked to determine the constitutionally of the state's system for financing public education against an equal protection challenge. We stated that the Legislature has few constitutional restraints in carrying out its duty to establish and maintain a free public educational system.[37] The Legislature's method in carrying out this duty is largely within its discretion.[38] When the methods used for carrying out this duty are challenged, "the only justiciable question is whether the Legislature acted within its powers."[39]

¶23 Likewise, fiscal policy is exclusively within the Legislature's power. Article V, section 55 of the Oklahoma Constitution vests the Legislature with the

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[31] Okla. Const. art. IV, § 1.

[32] Okla. Const. art. IV, § 1; art. V, § 55; art. XIII, § 1; *In re Initiative Petition No. 332, State Question No. 598*, 1989 OK 93, ¶5, 776 P.2d 556, 557.

[33] Okla. Const. art. XIII, § 1; *Musick v. State ex rel. Miles*, 1938 OK 603, ¶ 15, 90 P.2d 631, 634.

[34] *Musick*, 1938 OK 603 at ¶ 15, 90 P.2d at 634.

[35] *Sch. Dist. No. 25 v. Hodge*, 1947 OK 220, ¶ 2, 183 P.2d 575, 579.

[36] 1987 OK 114, 746 P.2d 1135.

[37] *Id.* at ¶ 62, 746 P.2d 1135, 1150.

[38] *Id.*

[39] *Id.*

function of appropriating funds. It provides:

> No money shall ever be paid out of the treasury of this State, nor any of its funds, nor any of the funds under its management, except in pursuance of an appropriation by law, nor unless such payments be made within two and one-half years after the passage of such appropriation act, and every such law making a new appropriation, or continuing or reviving an appropriation, shall distinctly specify the sum appropriated and the object to which it is to be applied, and it shall not be sufficient for such law to refer to any other law to fix such sum.

¶24 In *Calvey v. Daxon*,[40] we stated:

> This Court has no authority to consider the desirability, wisdom, or practicability of fiscal legislation. It is not our prerogative to question the sagacity of the expressed policy. Whether an act is wise or unwise, whether it is based on sound economic theory or whether it is the best means to achieve the desired result are matters for legislative determination. This Court, may not, based on its perception of how the State should conduct its business dealings, direct legislative decision making.

¶25 The legislature has the exclusive authority to declare the fiscal policy of Oklahoma limited only by constitutional prohibitions.[41] The plaintiffs have failed to provide us with any applicable limitations. The plaintiffs are attempting to circumvent the legislative process by having this Court interfere with and control the Legislature's domain of making fiscal-policy decisions and of setting educational policy by imposing mandates on the Legislature and by continuing to monitor and oversee the Legislature. To do as the plaintiffs ask would require this Court to invade the Legislature's power to determine policy. This we are constitutionally prohibited from doing.[42]

VI. Conclusion

¶26 The plaintiffs have failed to allege facts which would give them standing to assert a violation of Oklahoma students' constitutional rights. Questions of fiscal and educational policy are vested in the Legislature, and its wisdom in these areas is not within the scope of this Court's review.

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[40] 2000 OK 17, ¶ 21, 997 P.2d 164, 171-172 (footnotes omitted).

[41] *Id.*

[42] Okla. Const. art. IV, § 1.

¶27 We have previously taken judicial notice of the immeasurable social, psychological and economic value of an education in contemporary society.[43] We also are aware of the importance of an educated society to our system of government. However, the important role of education in our society does not allow us to override the constitutional restrictions placed on our judicial authority. The plaintiffs have failed to present an issue to this Court which is proper for our adjudication. The district court's judgment is affirmed.

AFFIRMED.

Winchester, C.J., Lavender, Opala, Watt, Taylor, Colbert, JJ., concur.

Edmondson, V.C.J., Hargrave, Kauger, JJ., concur in result.

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[43] *Indep. Sch. Dist. No. 8 v. Swanson*, 1976 OK 71, ¶ 25, 563 P.2d 496, 501.

EXHIBIT 9

assault, a Class IIIA felony.[30] Thurman was sentenced to 4 to 5 years' imprisonment for false imprisonment, 15 to 20 years' imprisonment for first degree sexual assault, 15 to 20 years' imprisonment for each count of use of a weapon to commit a felony, and 2 to 5 years' imprisonment for second degree assault, with the sentences to be served consecutively. Thurman could have been sentenced, under the statutory guidelines, to up to 160 years' imprisonment and was actually sentenced to between 51 and 70 years' imprisonment.

Thurman's sentences were well within the statutory guidelines. Our review of the record further indicates that the sentences were not an abuse of discretion. Thurman's final assignment of error is without merit.

IV. CONCLUSION

The judgment of the district court is affirmed.

AFFIRMED.

[30] § 28-309(2).

THE NEBRASKA COALITION FOR EDUCATIONAL EQUITY AND ADEQUACY (COALITION), ON ITS OWN BEHALF AND ON BEHALF OF ITS MEMBERS, ET AL., APPELLANTS AND CROSS-APPELLEES, V. DAVID HEINEMAN, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE STATE OF NEBRASKA, ET AL., APPELLEES AND CROSS-APPELLANTS.

___N.W.2d___

Filed May 11, 2007. No. S-05-1357.

1. **Summary Judgment: Motions to Dismiss: Rules of the Supreme Court: Pleadings.** Under Neb. Ct. R. of Pldg. in Civ. Actions 12(b)(6) (rev. 2003), when a matter outside of the pleadings is presented by the parties and accepted by the trial court, a defendant's motion to dismiss must be treated as a motion for summary judgment.
2. **Pleadings.** Matters outside the pleadings include any written or oral evidence in support of or in opposition to the pleading that provides some substantiation for and does not merely reiterate what is said in the pleadings.
3. **Summary Judgment: Motions to Dismiss: Notice.** When receiving evidence that converts a motion to dismiss into a motion for summary judgment, the trial court

should give the parties notice of the changed status of the motion and a reasonable opportunity to present all material made pertinent to such a motion.

4. ____: ____: ____. A district court's failure to give formal notice that it will treat a motion to dismiss for failure to state a claim as a motion for summary judgment is harmless where the nonmoving party has submitted materials outside of the pleadings in support of its resistance to a motion to dismiss.
5. **Summary Judgment.** Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
6. **Claims.** Whether a claim presents a nonjusticiable political question is a question of law.
7. **Judgments: Appeal and Error.** When reviewing questions of law, an appellate court resolves the questions independently of the lower court's conclusion.
8. **Constitutional Law: Courts.** The political question doctrine of justiciability is primarily a function of the separation of powers doctrine. It arises when a claim implicates the relationship between the judiciary and the coordinate branches of government.
9. **Declaratory Judgments: Proof.** To obtain declaratory relief, a plaintiff must prove the existence of a justiciable controversy and an interest in the subject matter of the action.
10. **Justiciable Issues.** A justiciable issue requires a present, substantial controversy between parties having adverse legal interests susceptible to immediate resolution and capable of present judicial enforcement.
11. **Constitutional Law: Schools and School Districts: Legislature.** The free instruction clause is directed to the Legislature, and the method and means to be adopted in order to furnish free instruction to the children of the state have been left by the Nebraska Constitution to the Legislature.
12. **Constitutional Law: Jurisdiction.** Unlike the standing doctrine of justiciability, the political question doctrine is not entangled with subject matter jurisdiction.
13. **Constitutional Law.** The Nebraska Supreme Court explicitly adopts the U.S. Supreme Court's justiciability tests under the political question doctrine.
14. ____. The distribution of powers clause of the Nebraska Constitution prohibits one branch of government from exercising the duties of another branch.
15. **Constitutional Law: Appeal and Error.** The separation of powers principle prevents the Nebraska Supreme Court from hearing a matter the determination of which the Nebraska Constitution entrusts to another coordinate department, or branch, of government.
16. **Constitutional Law: Legislature: Courts: Appeal and Error.** The Nebraska Supreme Court does not sit as a superlegislature to review the wisdom of legislative acts; that restraint reflects the reluctance of the judiciary to set policy in areas constitutionally reserved to the Legislature's plenary power.
17. **Constitutional Law: Courts.** Determining that an issue presents a nonjusticiable political question is not an abdication of the judiciary's duty to construct and interpret the Nebraska Constitution.
18. **Constitutional Law: Supreme Court.** Deciding whether a matter has in any measure been committed by the Nebraska Constitution to another branch of

government, or whether the action of that branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation and is a responsibility of the Nebraska Supreme Court as ultimate interpreter of the constitution.

19. **Constitutional Law: Courts.** All doctrines of justiciability—including standing, mootness, ripeness, and political question—are legal principles that arise out of prudential considerations of the proper role of the judiciary in democratic government.
20. **Constitutional Law: Legislature: Courts.** The political question doctrine excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the legislative or executive branches of government.
21. **Constitutional Law: Courts.** When a court concludes that an issue presents a nonjusticiable political question, it declines to address the merits of that issue and acknowledges the possibility that a constitutional provision may not be judicially enforceable.
22. ____: ____. The U.S. Supreme Court's justiciability tests under the political question doctrine are disjunctive, and a court should not dismiss a case for nonjusticiability unless one of the tests is inextricable from the case at bar.
23. **Constitutional Law: Schools and School Districts: Legislature.** The Nebraska Constitution textually commits to the Legislature the duty to adopt the method and means to furnish free instruction and the duty to encourage schools.
24. **Constitutional Law: Schools and School Districts: Legislature: Courts.** There are no qualitative, constitutional standards for public schools that the Nebraska Supreme Court can enforce, apart from the requirements that the education in public schools must be free and available to all children.
25. **Constitutional Law: Schools and School Districts: Legislature.** Nebraska's constitutional history shows the framers intentionally omitted any language from the free instruction clause that would have placed restrictions or qualitative standards on the Legislature's duties regarding education.
26. **Constitutional Law: Schools and School Districts: Legislature: Courts.** The Nebraska Supreme Court could not interpret the Legislature's duty to encourage schools under the religious freedom clause to mean that the Legislature must ensure a "quality" education except by ignoring the people's clear rejection of that standard.
27. **Schools and School Districts: Legislature.** The relationship between school funding and educational quality requires a policy determination that is clearly for the legislative branch.
28. **Constitutional Law: Legislature.** Fiscal policy issues are decisions that have been left to the Legislature by the Nebraska Constitution.

Appeal from the District Court for Lancaster County: JOHN A. COLBORN, Judge. Affirmed.

Robert V. Broom, of Broom, Johnson, Clarkson & Lanphier, and David C. Long for appellants.

Jon Bruning, Attorney General, Dale A. Comer, Charles E. Lowe, and Leslie S. Donley, and Mark C. Laughlin, Michael L. Schleich, and Timothy J. Thalken, of Fraser, Stryker, Meusey, Olson, Boyer & Bloch, P.C., for appellees.

David M. Pedersen, Jill Robb Ackerman, and Elizabeth Eynon-Kokrda, of Baird Holm L.L.P., for amici curiae Douglas County School District 0001 et al.

Rebecca L. Gould for amici curiae Joseph E. Lutjeharms et al.

Jeffery R. Kirkpatrick, of McHenry, Haszard, Hansen, Roth & Hupp, P.C., L.L.O., for amici curiae Nebraska Farmers Union and The South Platte United Chambers of Commerce.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

CONNOLLY, J.

This appeal presents a constitutional challenge to Nebraska's education funding system. The Nebraska Coalition for Educational Equity and Adequacy and other plaintiffs (collectively the Coalition) filed a declaratory judgment action. It alleged that the funding system does not provide sufficient funds for an "adequate" and "quality" education. It further alleged the funding inadequacy violates the free instruction and religious freedom clauses of the Nebraska Constitution. The Coalition seeks (1) a declaration that Nebraska's Constitution requires "an education which provides the opportunity for each student to become an active and productive citizen in our democracy, to find meaningful employment, and to qualify for higher education"; (2) a declaration that Nebraska's education funding system is unconstitutional; and (3) an injunction enjoining state officials from implementing the system.

The district court determined the Coalition's allegations that the Legislature had failed to provide sufficient funds to provide for an adequate education posed a nonjusticiable political question. We agree with the district court's reasoning and, accordingly, affirm.

I. CONSTITUTIONAL PROVISIONS

The Coalition claims that Nebraska's education funding system violates two separate provisions of the Nebraska Constitution: the religious freedom clause[1] and the free instruction clause.[2] The Coalition relies on the following sentence in the religious freedom clause: "Religion, morality, and knowledge, however, being essential to good government, it shall be the duty of the Legislature to pass suitable laws . . . to encourage schools and the means of instruction."[3] The free instruction clause provides in relevant part: "The Legislature shall provide for the free instruction in the common schools of this state of all persons between the ages of five and twenty-one years."[4]

II. BACKGROUND

The Coalition consists of 43 school districts. The other plaintiffs are two separate school districts in Colfax County, Nebraska, and four individuals in their capacities as taxpayers, school board members or officers, and parents of children in the two school districts. All of the State defendants are named in their official capacities, including: the Governor, the State Treasurer, the Director of Administrative Services, the Property Tax Administrator, the Commissioner of Education, and members of the State Board of Education (collectively the State).

All of the appellant school districts provide free instruction to their students. In the 2002-03 school year, local, state, and federal expenditures on grades K through 12 public education in Nebraska exceeded $2 billion. In fiscal year 2003-04, the State of Nebraska spent almost $780 million in direct state aid to education, including special education. This amount comprised almost 29 percent of the total state budget.

1. THE COALITION'S ALLEGATIONS

In its operative complaint, the Coalition alleged that the religious freedom and free instruction clauses had independent

[1] Neb. Const. art. I, § 4.

[2] Neb. Const. art. VII, § 1.

[3] Neb. Const. art. I, § 4.

[4] Neb. Const. art. VII, § 1.

meaning and that the Legislature's enactments on education were evidence of that meaning. Specifically, the Coalition alleged the Legislature has statutorily set forth the elements of a quality education in its mission statements for public schools[5] and in its requirements under the Quality Education Accountability Act.[6]

The Coalition alleged that the school funding system[7] fails to provide sufficient resources for an adequate education; that the school funding system fails to accurately assess the needs of small school districts because it does not reflect the real costs of services or the effects of growth caps on their budget and levy caps; that in 2003, the Legislature shifted more of the burden for funding onto local property tax bases by cutting state aid and increasing the local levy cap; and that because the funding system relies heavily on inadequate property tax bases, the system fails to provide sufficient resources and facilities. It also alleged that unlike services to special education students, services to English language learners and low-income students do not authorize school districts to exceed their budget caps.

To show that the funding was inadequate, the Coalition alleged that the plaintiff districts were unable to (1) adequately pay and retain teachers; (2) purchase necessary textbooks, equipment, and supplies; (3) replace or renovate facilities; and (4) offer college-bound courses, advanced courses for high-ability students, technology, and other extra-curricular courses, or adequate services for special education, English language learners, and vocational programs. The Coalition also alleged that a significant number of students did not graduate and that a significant number were academically deficient, as shown by assessment tests.

The Coalition asked the court to make three declarations. First, it sought a declaration that the religious freedom and free instruction clauses provide a fundamental right "to obtain free instruction which enables each student to become an active and

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[5] See Neb. Rev. Stat. §§ 79-701 and 79-702 (Reissue 2003).

[6] See Neb. Rev. Stat. §§ 79-757 to 79-762 (Reissue 2003 & Cum. Supp. 2006).

[7] See Tax Equity and Educational Opportunities Support Act, Neb. Rev. Stat. §§ 79-1001 to 79-1033 (Reissue 2003 & Cum. Supp. 2006).

productive citizen in our democracy, to find meaningful employment, and to qualify for higher education." Second, it asked the court to declare that the State has violated the plaintiffs' constitutional rights by implementing an unconstitutional school funding system. Finally, it asked the court to declare that Nebraska's school funding system is unconstitutional because it (1) fails to provide adequate resources to provide the free education guaranteed by these sections, (2) adversely affects the finances and ability of school districts and their officials to meet their obligation to provide students with a constitutionally required education, (3) causes an unconstitutional expenditure of tax dollars, and (4) violates the rights of school districts and their officials to execute their statutory duties. The Coalition asked the court to enjoin the State from further implementing Nebraska's school funding system.

2. THE STATE RESPONDS

The State moved to dismiss under Neb. Ct. R. of Pldg. in Civ. Actions 12(b)(1) and (6) (rev. 2003). At a hearing on the motion, the State submitted several exhibits. A report from the Board of State Canvassers of the State of Nebraska showed that in 1996, the voters had rejected, by a vote of 506,246 to 146,426, an initiative that, in relevant part, would have amended the Nebraska Constitution. The amendment would have made "'quality education' . . . a fundamental constitutional right of each person" and made the "'thorough and efficient education' of all persons between the ages of 5 and 21 in the common schools . . . the 'paramount duty' of the state."

A report from the State Department of Education showed that total expenditures for Nebraska public education in the 2002-03 school year was about $2.15 billion. The State's biennial budget for fiscal years 2003-04 and 2004-05 showed that the Legislature continued reductions in school aid from the year before through 2007. The budget also shows that without an extension of the changes in the school aid formula, state aid to schools would have increased by $175 million in fiscal years 2005-06 and 2006-07. Both parties submitted materials on the history of the Nebraska Constitution.

3. DISTRICT COURT'S JUDGMENT

The district court did not address the State's motion to dismiss under rule 12(b)(1), but dismissed the claims under rule 12(b)(6). Because we have jurisdiction, the district court's failure to rule on rule 12(b)(1) is of no consequence to our analysis.[8] The court determined that the claims presented nonjusticiable political questions. It concluded that "'[t]here is a lack of judicially discoverable or manageable standards for resolving the issue of whether the Nebraska school funding system satisfies the constitutional requirements of "free instruction in [the] common schools" or "suitable laws."'"

III. ASSIGNMENTS OF ERROR

The Coalition assigns that the district court erred in determining that all the issues presented by the amended complaint were nonjusticiable and therefore failed to state a cause of action.

In its cross-appeal, the State assigns that the district court erred in not dismissing the Coalition's complaint as failing to state a cause of action because (1) the Nebraska Constitution does not contain a qualitative right to an "adequate" or "quality" education, (2) Nebraska's education financing statutes are constitutional, and (3) the Coalition was not entitled as a matter of law to the declaration they sought regarding the Nebraska Constitution. Because we conclude that the case is nonjusticiable, we do not comment on the cross-appeal.

IV. STANDARD OF REVIEW

Because the parties submitted evidence on the State's motion to dismiss, we pause to clarify our standard of review. Dismissal under rule 12(b)(6) should be granted only in the unusual case in which a plaintiff's allegations show on the face of the complaint that there is some insuperable bar to relief.[9]

[1] Both parties, however, submitted evidence in support of or in opposition to the State's motion to dismiss for failure to state a claim. Rule 12(b)(6) provides that when a matter outside

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[8] See *Anderson v. Wells Fargo Fin. Accept.*, 269 Neb. 595, 694 N.W.2d 625 (2005).

[9] *Johnson v. Johnson*, 272 Neb. 263, 720 N.W.2d 20 (2006); *Spear T Ranch v. Knaub*, 269 Neb. 177, 691 N.W.2d 116 (2005).

of the pleadings is presented by the parties and accepted by the trial court, a defendant's motion to dismiss must be treated as a motion for summary judgment.[10] Rule 12(b) further provides that when a motion under this rule is treated as a motion for summary judgment, "all parties shall be given reasonable opportunity to present all material made pertinent to such a motion [for summary judgment] by statute."

[2-4] "'[M]atters outside the pleadings'" include "'any written or oral evidence in support of or in opposition to the pleading that provides some substantiation for and does not merely reiterate what is said in the pleadings.'"[11] We recently stated that when receiving evidence that converts a motion to dismiss into a motion for summary judgment, the trial court should give the parties notice of the changed status of the motion and a reasonable opportunity to present all material made pertinent to such a motion.[12] However,

> "[a] district court's failure to give formal notice that it will treat a motion to dismiss for failure to state a claim as a motion for summary judgment is harmless where the nonmoving party has submitted materials outside of the pleadings in support of its resistance to a motion to dismiss . . . ."[13]

[5] We review the court's order as converting the State's motion to dismiss into a motion for summary judgment. Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.[14]

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[10] *Crouse v. Pioneer Irr. Dist.*, 272 Neb. 276, 719 N.W.2d 722 (2006).

[11] *Hamm v. Rhone-Poulenc Rorer Pharmaceuticals, Inc.*, 187 F.3d 941, 948 (8th Cir. 1999).

[12] *Doe v. Omaha Pub. Sch. Dist.*, *ante* p. 79, 727 N.W.2d 447 (2007), citing *Country Club Estates, L.L.C. v. Town of Loma Linda*, 213 F.3d 1001 (8th Cir. 2000).

[13] *Hamm*, *supra* note 11, 187 F.3d at 949.

[14] *City of Lincoln v. Hershberger*, 272 Neb. 839, 725 N.W.2d 787 (2007).

[6,7] And whether a claim presents a nonjusticiable political question is a question of law.[15] When reviewing questions of law, we resolve the questions independently of the lower court's conclusion.[16]

V. ANALYSIS

[8] The overarching issue is whether the district court correctly concluded that the Coalition's claims present nonjusticiable political questions. The political question doctrine of justiciability is primarily a function of the separation of powers doctrine. It arises when a claim implicates the relationship between the judiciary and the coordinate branches of government.[17]

[9,10] In Nebraska, to obtain declaratory relief, a plaintiff must prove the existence of a justiciable controversy and an interest in the subject matter of the action.[18] A justiciable issue requires a present, substantial controversy between parties having adverse legal interests susceptible to immediate resolution and capable of present judicial enforcement.[19]

1. SUMMARY OF PARTIES' ARGUMENT

The Coalition argues that (1) taken together, the religious freedom and free instruction clauses require the Legislature to provide a free education that "at a minimum, [is] sufficient to allow each student to become an active and productive citizen in our democracy, to find meaningful employment, and to qualify for higher education," and (2) that the Legislature has failed to perform this duty.[20]

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[15] See, *Saldano v. O'Connell*, 322 F.3d 365 (5th Cir. 2003); *Custer County Action Ass'n v. Garvey*, 256 F.3d 1024 (10th Cir. 2001); *Maintenance Serv. v. Kenai Peninsula Bor.*, 850 P.2d 636 (Alaska 1993); *Starr v. Governor*, 910 A.2d 1247 (N.H. 2006).

[16] See *State ex rel. Columbus Metal v. Aaron Ferer & Sons*, 272 Neb. 758, 725 N.W.2d 158 (2006).

[17] *Baker v. Carr*, 369 U.S. 186, 82 S. Ct. 691, 7 L. Ed. 2d 663 (1962).

[18] See *Myers v. Nebraska Invest. Council*, 272 Neb. 669, 724 N.W.2d 776 (2006).

[19] *Rath v. City of Sutton*, 267 Neb. 265, 673 N.W.2d 869 (2004).

[20] Brief for appellants at 29.

The State contends that despite the lack of qualitative standards in the free instruction clause, the Coalition is asking this court to determine that the plaintiff districts lack adequate funding to provide a quality education. The State argues that (1) this determination would require one district court to examine the adequacy of virtually every educational resource and program of the plaintiff districts and (2) thus, what constitutes adequate funding for education is inherently a political question that is not subject to judicial review.

The Coalition counters that this court, by ruling that the school funding system is unconstitutional, would not violate the separation of powers doctrine. It asks us to follow decisions from other state courts determining that the issue is justiciable. We conclude, however, that those decisions are not helpful either because the plaintiffs based their claims on equal protection or uniformity clauses in their state constitutions[21] or because their states' constitutional provisions are significantly different from ours.[22]

The Coalition contends that if we decide the Legislature is not fulfilling its duty, it would not require us to prescribe the proper means of financing schools. This is correct, but if we were to declare the present funding constitutionally inadequate, we would be passing judgment on the Legislature's spending priorities as reflected in its appropriation decisions. Thus, we believe the critical issue is whether, without violating the separation of powers clause, this court may determine that the Legislature has failed to provide adequate funding for public education.

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[21] See, e.g., *Tennessee Small Schools Sys. v. McWherter*, 851 S.W.2d 139 (Tenn. 1993); *Brigham v. State*, 166 Vt. 246, 692 A.2d 384 (1997).

[22] See, e.g., *Lake View Sch. Dist. No. 25 v. Huckabee*, 351 Ark. 31, 91 S.W.3d 472 (2002); *ISEEO v. State*, 132 Idaho 559, 976 P.2d 913 (1998); *Montoy v. State*, 275 Kan. 145, 62 P.3d 228 (2003); *Columbia Falls Elementary School v. State*, 326 Mont. 304, 109 P.3d 257 (2005); *Abbott v. Burke*, 119 N.J. 287, 575 A.2d 359 (1990); *DeRolph v. State*, 78 Ohio St. 3d 193, 677 N.E.2d 733 (1997); *Edgewood Indep. School Dist. v. Kirby*, 777 S.W.2d 391 (Tex. 1989); *Seattle School Dist. v. State*, 90 Wash. 2d 476, 585 P.2d 71 (1978); *Pauley v. Kelly*, 162 W. Va. 672, 255 S.E.2d 859 (1979).

2. NEBRASKA CASE LAW UNDER FREE INSTRUCTION CLAUSE

We have stated, "What methods and what means should be adopted in order to furnish free instruction to the children of the state has been left by the constitution to the legislature."[23] In *State ex rel. Shineman v. Board of Education*,[24] the parents of 5-year-old children sought a peremptory writ of mandamus to compel a school district to provide a kindergarten class. The parents claimed that 5-year-olds had a clear right to public education under the free instruction clause and two statutes enacted under its authority. One of the statutes required schools organized in cities of that class to be free to all children between 5 and 21 years of age. The other statute prohibited admission to first grade for children under 5 years of age unless they would turn 6 by a specified date or had completed kindergarten.

[11] Because their children were ineligible for admission to first grade, the parents argued that their 5-year-olds were denied their right to a free education. We stated:

> The [free instruction clause] is clearly directed to the Legislature. . . . With reference to this provision we said in Affholder . . . that the method and means to be adopted in order to furnish free instruction to the children of the state have been left by the Constitution to the Legislature. Clearly, legislation is necessary to carry into effect the constitutional provision. It is not a self-executing provision. It follows that relators must find statutory authority to sustain their contention.[25]

In *State ex rel. Shineman*, the parents lacked the authority for a writ of mandamus because the statutes did not mandate that the school districts provide kindergartens. Moreover, another statute gave district school boards discretion to establish a school's grades.

The State argues that these cases show that the funding required to provide public education remains exclusive with the

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[23] *Affholder v. State*, 51 Neb. 91, 93, 70 N.W. 544, 545 (1897).

[24] *State ex rel. Shineman v. Board of Education*, 152 Neb. 644, 42 N.W.2d 168 (1950).

[25] *Id.* at 647-48, 42 N.W.2d at 170.

Legislature. The Coalition counters that these cases are not controlling because neither case required us to determine whether the Legislature had fulfilled its constitutional responsibilities. However, in *State ex rel. Shineman*, we declined to hold that the free instruction clause provided 5-year-olds with a right to education apart from what the Legislature had statutorily provided.

3. *GOULD V. ORR*

Alternatively, the Coalition argues that in *Gould v. Orr*,[26] we implicitly concluded that inadequate school funding is a justiciable issue. The Coalition's argument regarding *Gould* is twofold. First, they contend that the *Gould* court's exercise of jurisdiction shows this court considered the school funding issue to be justiciable because justiciability raises subject matter jurisdiction. Second, the Coalition contends the *Gould* court indicated a claim of inadequate funding that adversely affected a school district would state a cause of action under the Nebraska Constitution.

We agree that the *Gould* court exercised jurisdiction. But, "there is a significant difference between determining whether a . . . court has 'jurisdiction of the subject matter' and determining whether a cause over which a court has subject matter jurisdiction is 'justiciable.'"[27] In *Baker v. Carr*,[28] the U.S. Supreme Court explained the distinction between "lack of federal jurisdiction" and "inappropriateness of the subject matter for judicial consideration":

> In the instance of nonjusticiability, consideration of the cause is not wholly and immediately foreclosed; rather, the Court's inquiry necessarily proceeds to the point of deciding whether the duty asserted can be judicially identified and its breach judicially determined, and whether protection for the right asserted can be judicially molded. In the instance of lack of jurisdiction the cause either does not "arise under" the Federal Constitution, laws or treaties

[26] *Gould v. Orr*, 244 Neb. 163, 506 N.W.2d 349 (1993).

[27] *Powell v. McCormack*, 395 U.S. 486, 512, 89 S. Ct. 1944, 23 L. Ed. 2d 491 (1969), quoting *Baker, supra* note 17.

[28] *Baker, supra* note 17, 369 U.S. at 198.

> . . . or is not a "case or controversy" . . . or the cause is not one described by any jurisdictional statute.

[12] Unlike the standing doctrine of justiciability,[29] the political question doctrine is not entangled with subject matter jurisdiction.[30] Thus, by exercising jurisdiction in *Gould*, the court did not implicitly conclude that the claim was justiciable.

We also disagree with the Coalition's contention that the *Gould* court recognized a cause of action for inadequate school funding. Like the Coalition, the plaintiffs in *Gould* also argued that the "present statutory structure for funding public schools in Nebraska is unconstitutional and inadequate."[31] The district court granted summary judgment for the State. On appeal, the *Gould* majority concluded that the trial court committed plain error in failing to sustain the State's demurrer because the plaintiffs had not stated a cause of action:

> Appellants' petition clearly claims there is disparity in funding among school districts, but does not specifically allege any assertion that such disparity in funding is inadequate and results in inadequate schooling. While appellants' petition is replete with examples of disparity among the various school districts in Nebraska, they fail to allege in their petition how these disparities affect the quality of education the students are receiving. In other words, although appellants' petition alleges the system of funding is unequal, there is no demonstration that the education each student is receiving does not meet constitutional requirements.[32]

But the majority also determined that "there appeared no reasonable possibility that the defect could be remedied" and remanded the cause with directions for the district court to dismiss.[33]

Contrary to the Coalition's position, the *Gould* majority's conclusion that the plaintiffs could not amend their petition to

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[29] See *Chambers v. Lautenbaugh*, 263 Neb. 920, 644 N.W.2d 540 (2002).

[30] See, *Powell*, *supra* note 27; *Baker*, *supra* note 17.

[31] See *Gould*, *supra* note 26, 244 Neb. at 164, 506 N.W.2d at 350.

[32] *Id.* at 168-69, 506 N.W.2d at 353.

[33] *Id.* at 169, 506 N.W.2d at 353.

state a cause of action indicates that it probably determined the claim presented a nonjusticiable issue. However, the majority did not state the reason for its holding. And unlike the plaintiffs in *Gould*, the Coalition argues that the religious freedom clause imposes a qualitative component on the Legislature's duty to provide free instruction. Thus, we do not interpret *Gould* to decide this issue in favor of either party.

Arguably, our decision in *State ex rel. Shineman* could be extended to apply to this case. However, *State ex rel. Shineman* was limited to the right of 5-year-olds to kindergarten, rather than a right to an adequate education that implicates the entire school funding system. Thus, we look for further guidance in the criteria relied on by the district court.

[13] The district court relied upon the U.S. Supreme Court's tests in *Baker v. Carr*,[34] for determining whether an issue presents a nonjusticiable political question. Although we have implicitly recognized the political question doctrine,[35] we have not previously adopted the U.S. Supreme Court's justiciability tests under that doctrine, which we do now. We begin, however, with an overview of our separation of powers jurisprudence and an explanation of the political question doctrine.

4. The Political Question Doctrine

(a) Separation of Powers Doctrine in Nebraska

[14-16] In Nebraska, the distribution of powers clause[36] prohibits one branch of government from exercising the duties of another branch.[37] The separation of powers principle "prevents us from hearing a matter the determination of which the Constitution entrusts to another coordinate department, or branch, of government."[38] And, "[t]his court does not sit as a

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[34] *Baker, supra* note 17.

[35] See *State ex rel. Steinke v. Lautenbaugh*, 263 Neb. 652, 642 N.W.2d 132 (2002).

[36] Neb. Const. art. II, § 1.

[37] *State v. Divis*, 256 Neb. 328, 589 N.W.2d 537 (1999).

[38] *State ex rel. Spire v. Conway*, 238 Neb. 766, 773, 472 N.W.2d 403, 408 (1991).

superlegislature to review the wisdom of legislative acts."[39] That restraint reflects the reluctance of the judiciary to set policy in areas constitutionally reserved to the Legislature's plenary power.

(b) The Political Question Doctrine

[17,18] Determining that an issue presents a nonjusticiable political question is not an abdication of the judiciary's duty to construct and interpret the Nebraska Constitution.[40] The U.S. Supreme Court described the judiciary's duty in dealing with nonjusticiable political questions:

> Deciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution.[41]

"It is emphatically the province and duty of the judicial department to say what the law is."[42] "Sometimes, however, the law is that the judicial department has no business entertaining the claim of unlawfulness—because the question is entrusted to one of the political branches or involves no judicially enforceable rights."[43]

[19,20] All doctrines of justiciability—including standing, mootness, ripeness, and political question—are legal principles that arise out of prudential considerations of the proper role of the judiciary in democratic government.[44] The political question

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[39] See, e.g., *Gourley v. Nebraska Methodist Health Sys.*, 265 Neb. 918, 943, 663 N.W.2d 43, 68 (2003). Accord *State v. Ruzicka*, 218 Neb. 594, 357 N.W.2d 457 (1984).

[40] See *DeCamp v. State*, 256 Neb. 892, 594 N.W.2d 571 (1999).

[41] *Baker*, *supra* note 17, 369 U.S. at 211.

[42] *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177, 2 L. Ed. 60 (1803).

[43] *Vieth v. Jubelirer*, 541 U.S. 267, 277, 124 S. Ct. 1769, 158 L. Ed. 2d 546 (2004).

[44] See *Allen v. Wright*, 468 U.S. 737, 104 S. Ct. 3315, 82 L. Ed. 2d 556 (1984).

doctrine excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the legislative or executive branches of government.[45] The doctrine is "designed to restrain the Judiciary from inappropriate interference in the business of the other branches of Government."[46]

[21] "When a court concludes that an issue presents a nonjusticiable political question, it declines to address the merits of that issue [and] acknowledges the possibility that a constitutional provision may not be judicially enforceable."[47] In *Baker v. Carr*,[48] the U.S. Supreme Court set out the contours of the political question doctrine.

5. *Baker* Criteria for Determining Whether a Political Question Is Presented

[22] In *Baker*, the Court determined that a claim of discriminatory apportionment of state representatives was justiciable under the Equal Protection Clause. Before *Baker*, the Court had held that a challenge to state action based on the Guaranty Clause,[49] under which the United States guarantees each state a republican form of government, presented a nonjusticiable political question.[50] To explain the difference in these outcomes, the Court first reviewed its political question jurisprudence in several areas. It then defined "six independent tests,"[51] for determining whether an issue was nonjusticiable:

> Prominent on the surface of any case held to involve a political question is found [(1)] a textually demonstrable

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[45] See *Japan Whaling Assn. v. American Cetacean Soc.*, 478 U.S. 221, 106 S. Ct. 2860, 92 L. Ed. 2d 166 (1986).

[46] *United States v. Munoz-Flores*, 495 U.S. 385, 394, 110 S. Ct. 1964, 109 L. Ed. 2d 384 (1990).

[47] *Department of Commerce v. Montana*, 503 U.S. 442, 457-58, 112 S. Ct. 1415, 118 L. Ed. 2d 87 (1992).

[48] *Baker*, *supra* note 17.

[49] U.S. Const. art. IV, § 4.

[50] See *Baker*, *supra* note 17.

[51] *Vieth*, *supra* note 43, 541 U.S. at 277 (discussing *Baker*, *supra* note 17).

> constitutional commitment of the issue to a coordinate political department; or [(2)] a lack of judicially discoverable and manageable standards for resolving it; or [(3)] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [(4)] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [(5)] an unusual need for unquestioning adherence to a political decision already made; or [(6)] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.
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> Unless one of these formulations is inextricable from the case at bar, there should be no dismissal for nonjusticiability on the ground of a political question's presence. The doctrine of which we treat is one of "political questions," not one of "political cases." The courts cannot reject as "no law suit" a bona fide controversy as to whether some action denominated "political" exceeds constitutional authority. The cases we have reviewed show the necessity for discriminating inquiry into the precise facts and posture of the particular case, and the impossibility of resolution by any semantic cataloguing.[52]

As set forth, the tests are disjunctive: a court should not dismiss a case for nonjusticiability "[u]nless one of these formulations is inextricable from the case at bar."[53]

The *Baker* Court explained that claims under the Guaranty Clause were nonjusticiable because they embodied elements that defined a political question. Under the second test—lack of judicially discoverable and manageable standards—the Court could not resolve apportionment claims. It stated that "the Guaranty Clause is not a repository of judicially manageable standards which a court could utilize independently in order to identify a State's lawful government."[54] In contrast, the equal protection

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[52] *Baker, supra* note 17, 369 U.S. at 217.

[53] *Id.*

[54] *Id.* at 223.

claim presented the issue of the consistency of state action and was justiciable. The Court left open the possibility, however, that some 14th Amendment claims would be nonjusticiable because they are too enmeshed with one of the political question tests.[55]

The Coalition, however, argues that the U.S. Supreme Court has rejected the *Baker* tests. But *Baker* is still alive. As recently as 2004, the Court applied the second test to determine that political gerrymandering claims regarding congressional redistricting plans presented nonjusticiable political questions.[56]

6. APPLICATION OF *BAKER* TESTS TO COALITION'S CLAIMS

(a) Textually Demonstrable Constitutional Commitment of Issue to Coordinate Political Department

[23] As discussed, we have already determined that the free instruction "provision is clearly directed to the Legislature" and that the duty to adopt the method and means to furnish free instruction has been left by the state Constitution to the Legislature.[57] The plain language of the religious freedom clause also textually commits to the Legislature the duty to encourage schools: "it shall be the *duty of the Legislature* to pass suitable laws . . . to encourage schools and the means of instruction."[58]

However, the U.S. Supreme Court has stated:

> [T]he concept of a textual commitment to a coordinate political department is not completely separate from the concept of a lack of judicially discoverable and manageable standards for resolving [the second test]; the lack of judicially manageable standards may strengthen the conclusion that there is a textual demonstrable commitment to a coordinate branch.[59]

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[55] *Baker, supra* note 17.

[56] See *Vieth, supra* note 43.

[57] *State ex rel. Shineman, supra* note 24, 152 Neb. at 647, 42 N.W.2d at 170.

[58] Neb. Const. art. I, § 4. Compare, *Lake View Sch. Dist. No. 25, supra* note 22; *Seattle School Dist., supra* note 22.

[59] *Nixon v. United States*, 506 U.S. 224, 228, 113 S. Ct. 732, 122 L. Ed. 2d 1 (1993).

(b) Lack of Judicially Discoverable and Manageable Standards for Resolving Issue

[24] The district court concluded that "[t]here is a lack of judicially discoverable or manageable standards for resolving the issue of whether the Nebraska school funding system satisfies the constitutional requirements of 'free instruction in common schools' or 'suitable laws.'" We agree that under the second *Baker* test, there are no qualitative, constitutional standards for public schools that this court could enforce, apart from the requirements that the education in public schools must be free and available to all children.[60] Nebraska's constitutional history shows that the people of Nebraska have repeatedly left school funding decisions to the Legislature's discretion. Even more illuminating, the people rejected a recent amendment that would have imposed qualitative standards on the Legislature's duty to provide public education.

(i) Nebraska's Constitutional History Regarding Legislature's Duty to Provide Free Public Schools Shows Qualitative Standards Have Been Omitted

In Nebraska's first state Constitution, the framers rejected the "thorough and efficient" language that is found in many other state constitutions. In its cross-appeal, the State correctly points out that the education article in Nebraska's 1866 territorial constitution contained a more qualitative duty to secure a system of schools. It also referred to the means of financing schools: "The legislature shall make such provisions by taxation or otherwise, as, with the income arising from the school trust fund, will secure a thorough and efficient system of common schools throughout the state . . . ."[61] After Nebraska was admitted as a state, however, the 1875 constitution did not contain

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[60] See, *Tagge v. Gulzow*, 132 Neb. 276, 271 N.W. 803 (1937); *State, ex rel. Baldwin v. Dorsey*, 108 Neb. 134, 187 N.W. 879 (1922); *Martins v. School District*, 101 Neb. 258, 162 N.W. 631 (1917).

[61] Nebraska Legislative Reference Bureau & Nebraska State Historical Society, bulletin No. 13, Nebraska Constitutions of 1866, 1871 & 1875, at 126, 128 (Addison E. Sheldon ed., 1920).

the "thorough and efficient" language or refer to any means of financing schools.[62]

Additionally, the framers rejected language that would have required uniformity between schools. Article VII, § 5, of the 1871 proposed state constitution would have included a uniformity clause: "The legislature shall provide by law for the establishment of district schools *which shall be as nearly uniform as practicable*, and such schools shall be free, and without charge for tuition, to all children between the ages of five and twenty-one years."[63] The 1871 constitution, however, was never adopted.[64] Although the constitutional debates from the 1875 convention have been lost,[65] there is no uniformity clause in the 1875 constitution.[66]

In 1972, the people explicitly left all funding of public schools to the Legislature's exclusive discretion. The 1875 constitution contained a separate section requiring "an equitable distribution of the income of the fund set [a]part for the support of the common schools, among the several school districts."[67] This provision, however, was omitted from the Nebraska Constitution as part of 1972 amendments "to recodify, revise, and clarify" article VII.[68] The Nebraska Constitution now provides that all funds "for the support and maintenance of the common schools" shall be used "as the Legislature shall provide."[69]

Finally, in 1996, voters rejected a constitutional amendment that would have imposed qualitative standards on the type of education the Legislature must provide. The amendment would have made a "'quality education' . . . a fundamental

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[62] *Id.* at 125.

[63] *Id.* at 124 (emphasis supplied).

[64] *Id.* at 3.

[65] See *Jaksha v. State*, 222 Neb. 690, 385 N.W.2d 922 (1986).

[66] Nebraska Constitutions of 1866, 1871 & 1875, *supra* note 61.

[67] *Id.* at 127.

[68] See 1972 Neb. Laws, L.B. 1023.

[69] Neb. Const. art. VII, § 9.

constitutional right of each person" and a "'thorough and efficient education' . . . the 'paramount duty' of the state."

[25] This constitutional history shows that the framers of the 1875 constitution intentionally omitted any language from the free instruction clause that would have placed restrictions or qualitative standards on the Legislature's duties regarding education. Nor has the Coalition pointed to any history showing that the framers intended the State to make up for funding shortages in individual school districts. We interpret the paucity of standards in the free instruction clause as the framers' intent to commit the determination of adequate school funding solely to the Legislature's discretion, greater resources, and expertise.

(ii) The Religious Freedom Clause Does Not Add Qualitative Standards to the Legislature's Duty to Provide Free Instruction

Contrary to the Coalition's argument, the Legislature's general duty under the religious freedom clause to pass suitable laws to encourage schools does not alter our conclusion that the Nebraska Constitution lacks enforceable standards. The Legislature in 1881 enacted a law establishing a system of public school districts.[70] But this enactment did not require the Legislature to allocate state revenues for the funding of the districts. Moreover, we have stated: "'A school district is a creation of the Legislature. Its purpose is to *fulfill* the constitutional duty placed upon the Legislature "to encourage schools and the means of instruction" and it is a governmental subdivision to which authority to levy taxes may properly be delegated under the Constitution.'"[71]

[26] Thus, we have not interpreted the religious freedom clause as imposing an affirmative duty on the Legislature to encourage schools beyond the establishment of school districts with authority to raise taxes. We do not question the importance of the Legislature's duty to encourage schools. But if we

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[70] 1881 Neb. Laws, ch. 78, p. 331-87.

[71] *Banks v. Board of Education of Chase County*, 202 Neb. 717, 719-20, 277 N.W.2d 76, 79 (1979) (emphasis supplied), quoting *Campbell v. Area Vocational Technical School No. 2*, 183 Neb. 318, 159 N.W.2d 817 (1968).

interpreted that duty to mean that the Legislature must ensure the "quality" education the Coalition seeks, we would be ignoring the people's clear rejection of that standard in 1996.[72] Nor do we believe that the Legislature's authority to provide state aid to school districts is subject to the judiciary's intervention.

(c) Impossibility of Deciding Issue Without Making Policy Determinations Clearly Requiring Nonjudicial Discretion

Any judicial standard effectively imposing constitutional requirements for education would be subjective and unreviewable policymaking by this court. As the Illinois Supreme Court stated:

> It would be a transparent conceit to suggest that whatever standards of quality courts might develop would actually be derived from the constitution in any meaningful sense. Nor is education a subject within the judiciary's field of expertise . . . . Rather, the question of educational quality is inherently one of policy involving philosophical and practical considerations that call for the exercise of legislative and administrative discretion.
>
> To hold that the question of educational quality is subject to judicial determination would largely deprive the members of the general public of a voice in a matter which is close to the hearts of all individuals in Illinois. . . . In contrast, an open and robust public debate is the lifeblood of the political process in our system of representative democracy. Solutions to problems of educational quality should emerge from a spirited dialogue between the people of the State and their elected representatives.[73]

[27] We conclude that the relationship between school funding and educational quality requires a policy determination that is clearly for the legislative branch. Although an overall goal of state aid to schools is to reduce reliance on property tax,

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[72] See *Pony Lake Sch. Dist. v. State Committee for Reorg.*, 271 Neb. 173, 710 N.W.2d 609 (2006).

[73] *Committee for Educational Rights v. Edgar*, 174 Ill. 2d 1, 28-29, 672 N.E.2d 1178, 1191, 220 Ill. Dec. 166, 179 (1996).

there are a multitude of policy decisions that go into state funding decisions, including consideration of federal mandates, the school district's local efforts and ability to support its schools, and the State's ability to provide funding.[74] In brief, it is beyond our ken to determine what is adequate funding for public schools. This court is simply not the proper forum for resolving broad and complicated policy decisions or balancing competing political interests.

(d) Impossibility of Resolving Issue Without Disregarding Legislature's Exclusive Authority

The fourth *Baker* test is the impossibility of a court's deciding an issue without expressing lack of the respect due coordinate branches of government.[75] The State correctly points out that we have stated: "'[T]he control of the purse strings of government is a legislative function.'"[76]

[28] Fiscal policy issues are the very decisions that have been left to the Legislature by the Nebraska Constitution.[77] We could not hold that the Legislature's expenditures were inadequate without invading the legislative branch's exclusive realm of authority. In effect, we would be deciding what spending issues have priority. The Florida Supreme Court came to the same conclusion:

> "To decide such an abstract question of 'adequate' funding, the courts would necessarily be required to subjectively evaluate the Legislature's value judgments as to the spending priorities to be assigned to the state's many needs, education being one among them. In short, the Court would have to usurp and oversee the appropriations power, either directly or indirectly, in order to grant the relief sought by Plaintiffs. While Plaintiffs assert that they do not ask the

[74] See, § 79-1002, *supra* note 7; Floor Debate, L.B. 540, Committee on Education, 98th Leg., 1st Sess. (Apr. 24, 2003).

[75] See *Baker*, *supra* note 17.

[76] *State ex rel. Meyer v. State Board of Equalization & Assessment*, 185 Neb. 490, 498, 176 N.W.2d 920, 925 (1970), quoting *Colbert v. State*, 86 Miss. 769, 39 So. 65 (1905).

[77] See Neb. Const. art. III, § 25.

Court to compel the Legislature to appropriate any specific sum, but merely to declare that the present funding level is constitutionally inadequate, what they seek would nevertheless require the Court to pass upon those legislative value judgments which translate into appropriations decisions."[78]

(c) Courts' Inability to Immediately Resolve School Funding Disputes

As noted, a justiciable issue must be susceptible to immediate resolution and capable of present judicial enforcement.[79] But courts have been unable to immediately resolve school funding disputes. For example, after a decade of litigating the constitutionality of the state's school funding system and despite legislative enactments in the interim, the Arkansas Supreme Court affirmed the trial court's determination that the system was inadequate. The court stayed its mandate, however, to give the legislature an opportunity to implement appropriate changes.[80] When the legislature did not comply, the court recalled its mandate and appointed a master three separate times, despite dissents that the court had no jurisdiction to recall its mandate to examine subsequent legislation or to give orders to the legislature.[81]

A similar history occurred in Kansas. The Kansas Supreme Court first reversed the trial court's dismissal of the case.[82] Two years later, it affirmed the trial court's judgment that the school funding system was constitutionally inadequate and required increased funding. The Kansas court also retained jurisdiction to allow the legislature time to correct the constitutional

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[78] *Coalition for Adequacy v. Chiles*, 680 So. 2d 400, 406-07 (Fla. 1996).

[79] *Rath*, *supra* note 19.

[80] *Lake View Sch. Dist. No. 25*, *supra* note 22.

[81] *Lake View Sch. Dist. No. 25 v. Huckabee*, 364 Ark. 398, ___ S.W.3d ___ (2005); *Lake View School Dist. No. 25 v. Huckabee*, 362 Ark. 520, 210 S.W.3d 28 (2005); *Lake View School Dist. No. 25 v. Huckabee*, 355 Ark. 617, 142 S.W.3d 643 (2004).

[82] *Montoy*, *supra* note 22.

deficiencies.[83] Six months later, the court held that the new school financing scheme also failed to pass constitutional muster and ordered $285 million in additional appropriations for the next school year while the legislature made further corrections.[84] In 2006, the court finally dismissed the case after the state showed it had increased total funding to schools by an estimated $755.6 million.[85]

Other states have entertained continuous appeals and ordered appropriations from state legislatures as judicial remedies. For example, the Texas Supreme Court has addressed the constitutionality of the state's school funding system six times since 1989.[86] The Alabama Supreme Court, "after issuing four decisions in this case over the past nine years," conceded that "the pronouncement of a specific remedy 'from the bench' would necessarily represent an exercise of the power of that branch of government charged by the people of the State of Alabama with the sole duty to administer state funds to public schools: the Alabama Legislature."[87]

The New Jersey Supreme Court first struck down the state's funding system in 1973.[88] A generation later, the court had decided a string of cases on the issue and struck down three enactments as unconstitutional.[89]

In *Abbott by Abbott*,[90] the New Jersey Supreme Court ordered the state to increase funding to special needs districts by an

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[83] See *Montoy v. State*, 278 Kan. 769, 102 P.3d 1160 (2005).

[84] *Montoy v. State*, 279 Kan. 817, 112 P.3d 923 (2005).

[85] *Montoy v. State*, 282 Kan. 9, 138 P.3d 755 (2006).

[86] See, *Neeley v. West Orange-Cove*, 176 S.W.3d 746 (Tex. 2005); *West Orange-Cove Consol. I.S.D. v. Alanis*, 107 S.W.3d 558 (Tex. 2003); *Edgewood Independent Sch. Dist. v. Meno*, 917 S.W.2d 717 (Tex. 1995); *Carrollton-Farmers v. Edgewood Independent*, 826 S.W.2d 489 (Tex. 1992); *Edgewood Indep. Sch. Dist. v. Kirby*, 804 S.W.2d 491 (Tex. 1991); *Edgewood Indep. School Dist.*, *supra* note 22.

[87] *Ex parte James*, 836 So. 2d 813, 816-17 (Ala. 2002).

[88] See *Robinson, et al. v. Cahill, et al.*, 62 N.J. 473, 303 A.2d 273 (1973).

[89] See *Abbott by Abbott v. Burke*, 149 N.J. 145, 693 A.2d 417 (1997).

[90] *Id.*

amount that would equalize the average per-pupil expenditures in those districts with the average per-pupil expenditures in wealthier districts. The dissent noted that since 1990, the state had increased school funding to special needs districts by $850 million and estimated that the majority's ordered expenditures would amount to at least $248 million more.[91] Since 1997, the court has decided three additional appeals.[92] "The volume of litigation and the extent of judicial oversight provide a chilling example of the thickets that can entrap a court that takes on the duties of a Legislature."[93]

The landscape is littered with courts that have been bogged down in the legal quicksand of continuous litigation and challenges to their states' school funding systems. Unlike those courts, we refuse to wade into that Stygian swamp.

VI. CONCLUSION

The Nebraska Constitution commits the issue of providing free instruction to the Legislature and fails to provide judicially discernible and manageable standards for determining what level of public education the Legislature must provide. This court could not make that determination without deciding matters of educational policy in disregard of the policy and fiscal choices that the Legislature has already made. Nor could we impose a constitutional standard of a "quality" education without ignoring the people's clear rejection of that standard in 1996. We conclude, as the district court did, that the claims therefore present nonjusticiable political questions.

AFFIRMED.

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[91] *Id.* (Garibaldi, J., dissenting).

[92] *Abbott ex rel. Abbott v. Burke*, 177 N.J. 578, 832 A.2d 891 (2003); *Abbott ex rel. Abbott v. Burke*, 170 N.J. 537, 790 A.2d 842 (2002); *Abbott by Abbott v. Burke*, 153 N.J. 480, 710 A.2d 450 (1998).

[93] *City of Pawtucket v. Sundlun*, 662 A.2d 40, 59 (R.I. 1995) (discussing New Jersey cases).

EXHIBIT 10

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

MATHEW & STEPHANIE McCLEARY,)
on their own behalf and on)
behalf of KELSEY & CARTER)
McCLEARY, their two children)
in Washington's public) No. 07-2-02323-2SEA
schools; et al.,)
Petitioners,)
vs.)
STATE OF WASHINGTON,)
Respondent.)

DEPOSITION UPON ORAL EXAMINATION

OF

TERRY BERGESON

2:05 p.m.

February 21, 2007

Old Capitol Building

Olympia, Washington

Margaret Walkky, CCR, RPR, RMR, CRR

Court Reporter, License No. 2540

report, bottom right-hand side, the last paragraph where it says, "Our students are falling behind other states and nations," do you see that?

A. Yes, I do.

Q. Could you explain to me what your understanding is of "are falling behind other states and nations"? How are we falling behind, is my question?

A. My data tells me that in the State of Washington, we are gaining on the other states in the nation. So the data that I would use from my work is we are in the top tier on the national assessment of educational progress. We used to be in the middle. We're up in the top four in the nation tied with several other states, but we're certainly not falling behind.

We as a nation have been behind. I have no data on Washington kids as it relates to other nations, but our nation in the international math and science reports, we're in great shape in the fourth grade, we're in the middle of the pack in the seventh, and we're in the bottom of the pack in the probably the twelfth grade, is when they would be looking at it in TIMSS and PISA, which is the other international benchmarking exam that we don't fare well at the high

school level.

Q. These --

A. I don't think we're getting better.

Q. And the kind of data we're talking about here, these are tests other than tests against Washington's EALRs; is that correct?

A. Yes, this would be the SAT where we've been the top state in the nation for three years in a row of states that have lots of kids taking the test.

Q. To flaunt my ignorance, is that data based on kids that do take the SAT, the ones in Washington do relatively well?

A. Yeah, it's the -- we have about 70 percent of our kids that take the SAT, which is a very large number. And we're first in the nation for the states that have more than half of the kids taking the test.

We're third in the nation on the American College Tests and we only have about 11,000 kids that take those tests. They're our more elite kids and we're at the top. My picture of falling behind would not agree with this.

Q. So our record is clear, the ACT, that would be the American College Test?

A. ACT, college placement test.

Q. On page 17, "Our students are falling

behind other states and nations," you disagree with that?

A. I would disagree with that, yes.

Q. I'd like to talk about the WASL scores for just a little bit. My understanding is that only 35 percent of tenth graders passed the science WASL this last year. Is that --

A. That's probably correct. It might be closer to 36, but --

Q. In the neighborhood of 35?

A. In the neighborhood of 35, not a happy number.

Q. In the neighborhood of 51 percent tenth graders passed the math WASL?

A. 58 percent now.

Q. It's 58 for, is that 2007 as opposed to 2006?

A. No, 2006 with the retakes that we had in this fall, we have 58 percent of the kids have met the math standard.

Q. Handing you a two-page document, one of which is the page with some charts on it, it's from a Student Success 2005 presentation.

A. Right.

Q. Could you explain to me briefly what the

winter conference, so that's why the date of 2007 is on it.

Q. I'm noticing in the copy I handed you, it's not clear. So folding over the page so you don't see my chicken scratching and then start getting mad at me for never learning penmanship, I'll just show you my copy. You'll see that at the bottom there are some darker numbers?

A. Right, yes.

Q. Explain to me what those are.

A. Yeah, this is in grades 3, 5, 6 and 8, this is the first time we ever tested those kids on the WASL.

Q. All right.

A. And that was the initial score, the initial, not the score, but the initial percent of kids that met the standard in math.

Q. Okay.

A. These were 4, 7 and 10 where we've had the benchmarks for years, and the darker portion is where we started in grade 4, that would have been 1997, '98 for grade 7, and '99 for grade 10. Those were the percent of kids who met the standard then. These are the percent who met them this year.

So what I was comparing in this slide, it

this is the page where it says, "Right now," and then it lists several bullets about Washington. Right above the section heading that says "Our Mission," it says, "These facts cannot be ignored. Education is the key to success in the global economy, and our education system is not preparing our students to compete."

Do you see that?

A. Uh-huh.

Q. Is this one of the statements you agree with or disagree with, "our education system is not preparing our students to compete"?

A. No, I really don't agree with that. I believe that the structure that we've set up, the standards that we have, the support systems that we're providing and that the districts are providing, is that we really are preparing kids on the right standards to compete in a global marketplace. Whether they're all yet able to compete may be a different issue, but I don't agree. I don't know, I can agree and disagree with the statement, but I think we are making --

Q. Significant progress?

A. -- great significant progress and we're doing the right things to make this happen.

Q. You can say you can agree or disagree with the statements. In which ways do you agree with it

rely on bonds to build schools, but the reliance on levies has increased. And I described to you the salary issue because there is a way to get salary increases through the local levies and they have used that avenue.

Q. "They" being the school districts?

A. "They" being the school districts and the teachers associations.

Q. The school districts that are able to pay teachers more money through the local levies are the school districts that have the actual levy dollars?

A. That is correct.

Q. In your almost three now full terms of being Superintendent of Public Instruction, are you familiar with the way the legislative appropriations process works for education?

A. Yes, I am.

Q. To the best of your knowledge, has the legislature actually determined how much it actually costs to provide the constitutionally required basic education to every child in our state?

A. Will you ask me that question one more time?

Q. Sure. To the best of your knowledge, has the legislature determined how much it actually costs

in dollar terms to provide the constitutionally required basic education to every child residing in our state?

A. Yes, I think they're very observant of the way that basic education is operationally defined and they fund it.

Q. Is it your belief they actually determined that dollar amount, how much it actually costs to pay the constitutionally required basic education?

MR. CLARK: Asked and answered. I'd object. You can go ahead and answer the question.

A. The Doran decision told them to define it. They defined it and they fund their definition.

Q. They fund what they believe their definition is; is that your testimony?

A. Well, they fund the definition that's in the statute.

Q. When you say the definition in the statute, do you mean paying for X hours or X number of days?

A. Well, it's one of the things that we studied quite deeply in this Washington Learns. I learned more than I -- I thought I knew everything about the system, but I found out that I didn't. So there are very -- while we have the learning goals and

EXHIBIT 11

CERTIFICATION OF ENROLLMENT

ENGROSSED SECOND SUBSTITUTE SENATE BILL 5841

Chapter 400, Laws of 2007

(partial veto)

60th Legislature
2007 Regular Session

STUDENT LEARNING OPPORTUNITIES AND ACHIEVEMENT

EFFECTIVE DATE: 07/22/07

Passed by the Senate April 20, 2007
YEAS 34 NAYS 14

BRAD OWEN

President of the Senate

Passed by the House April 17, 2007
YEAS 62 NAYS 36

FRANK CHOPP

Speaker of the House of Representatives

Approved May 9, 2007, 10:02 a.m., with the exception of sections 6 and 7 which are vetoed.

CHRISTINE GREGOIRE

Governor of the State of Washington

CERTIFICATE

I, Thomas Hoemann, Secretary of the Senate of the State of Washington, do hereby certify that the attached is **ENGROSSED SECOND SUBSTITUTE SENATE BILL 5841** as passed by the Senate and the House of Representatives on the dates hereon set forth.

THOMAS HOEMANN

Secretary

FILED

May 11, 2007

Secretary of State
State of Washington

ENGROSSED SECOND SUBSTITUTE SENATE BILL 5841

AS AMENDED BY THE HOUSE

Passed Legislature - 2007 Regular Session

State of Washington 60th Legislature 2007 Regular Session

By Senate Committee on Ways & Means (originally sponsored by Senators Hobbs, McAuliffe, Rockefeller, Tom, Oemig, Kauffman, Regala, Kohl-Welles and Rasmussen)

READ FIRST TIME 03/05/07.

AN ACT Relating to enhancing student learning opportunities and student achievement; amending RCW 28A.150.210; adding a new section to chapter 28A.150 RCW; adding new sections to chapter 28A.630 RCW; adding a new section to chapter 28A.215 RCW; adding a new section to chapter 28A.300 RCW; adding a new section to chapter 28A.155 RCW; creating new sections; and providing expiration dates.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

Sec. 1. RCW 28A.150.210 and 1993 c 336 s 101 are each amended to read as follows:

((~~The goal of the Basic Education Act for the schools of the state of Washington set forth in this chapter shall be to provide students with the opportunity to become responsible citizens, to contribute to their own economic well being and to that of their families and communities, and to enjoy productive and satisfying lives. To these ends, the goals of each school district, with the involvement of parents and community members, shall be to provide opportunities for all students to develop the knowledge and skills essential to:~~

~~(1) Read with comprehension, write with skill, and communicate effectively and responsibly in a variety of ways and settings;~~

~~(2) Know and apply the core concepts and principles of mathematics; social, physical, and life sciences; civics and history; geography; arts; and health and fitness;~~

~~(3) Think analytically, logically, and creatively, and to integrate experience and knowledge to form reasoned judgments and solve problems; and~~

~~(4) Understand the importance of work and how performance, effort, and decisions directly affect future career and educational opportunities.~~)) The goal of the basic education act for the schools of the state of Washington set forth in this chapter shall be to provide students with the opportunity to become responsible and respectful global citizens, to contribute to their economic well-being and that of their families and communities, to explore and understand different perspectives, and to enjoy productive and satisfying lives. Additionally, the state of Washington intends to provide for a public school system that is able to evolve and adapt in order to better focus on strengthening the educational achievement of all students, which includes high expectations for all students and gives all students the opportunity to achieve personal and academic success. To these ends, the goals of each school district, with the involvement of parents and community members, shall be to provide opportunities for every student to develop the knowledge and skills essential to:

(1) Read with comprehension, write effectively, and communicate successfully in a variety of ways and settings and with a variety of audiences;

(2) Know and apply the core concepts and principles of mathematics; social, physical, and life sciences; civics and history, including different cultures and participation in representative government; geography; arts; and health and fitness;

(3) Think analytically, logically, and creatively, and to integrate different experiences and knowledge to form reasoned judgments and solve problems; and

(4) Understand the importance of work and finance and how performance, effort, and decisions directly affect future career and educational opportunities.

NEW SECTION. **Sec. 2.** A new section is added to chapter 28A.150 RCW to read as follows:

THE HONORABLE PARIS K. KALLAS

STATE OF WASHINGTON
KING COUNTY SUPERIOR COURT

MATHEW & STEPHANIE McCLEARY, on their own and on behalf of KELSEY & CARTER McCLEARY, their two children in Washington's public schools; ROBERT & PATTY VENEMA, on their own behalf and on behalf of HALIE & ROBBIE VENEMA, their two children in Washington's public schools; and NETWORK FOR EXCELLENCE IN WASHINGTON SCHOOLS ("NEWS"), a state-wide coalition of community groups, public school districts, and education organizations,

Petitioners,

v.

STATE OF WASHINGTON,

Respondent.

NO. 07-2-02323-2 SEA

RESPONDENT'S OPPPOSITION TO MOTION FOR SUMMARY JUDGMENT ON LIABILITY AND REMEDY

ORIGINAL

ATTORNEY GENERAL OF WASHINGTON
Complex Litigation Division
800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188
(206) 464-7352

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I. INTRODUCTION

On January 11, 2007, Petitioners filed this lawsuit, claiming the State is not meeting its constitutional obligation to fully fund a program of basic education for Washington's students. Though styled a Motion "concerning legal interpretation", Petitioners ask the Court to rule that the State under funds basic education (the liability claim pleaded in their Petition) and to issue an extraordinary writ or mandatory injunction, imposing the remedy sought in the Petition.

Summary judgment is inappropriate for at least the following reasons:

1. The requested *definition of terms appearing in Article IX of the state* constitution is improper. The Supreme Court already has interpreted and construed Article IX's terms to impose a duty to define and fund a basic education program for Washington's school children.

2. Contrary to Petitioners' argument, RCW 28A.150.210 does not define the content of basic education, but is merely an amended statement of goals and opportunities, with the program and funding of basic education defined in other statutes.

3. Genuine and material factual issues permeate the issue of liability--whether the State has fulfilled its constitutional duty to fund a program of basic education. Petitioners also must prove their claim beyond a reasonable doubt.

4. The remedy sought--mandating the Legislature to conduct a study and report back to the Court in one year—would be error because the means and methods of fulfilling constitutional duties are the Legislature's exclusive prerogative.

5. Even if it had merit, Civil Rule 56(f) justifies denial of the Motion to allow Respondent to conduct discovery and prepare the defense of a case of this magnitude and potential impact on educational policy and funding.

Finally, Petitioners support their Motion with incompetent evidence that should be stricken.

II. RELIEF REQUESTED

Respondent requests the Court to strike portions of the declarations of Ramsey Ramerman and Edmund Robb, to deny the Motion for Summary Judgment and to order that, if liability is proven, the Court's remedy will not mandate how the Legislature is to fulfill its constitutional duty under Article IX.

III. STATEMENT OF PERTINENT FACTS

The factual history important to this Motion includes: (1) four Washington court decisions concerning school funding; (2) the provisions of the Basic Education Act and related statutes that define and fully fund the State's program of basic education; (3) the biennial process whereby the costs of the program are appropriated and allocated to the school districts; (4) the education program and funding reform process initiated by Washington Learns and its continuation through laws passed in the just-concluded biennial legislative session; and (5) the significantly undeveloped state of a record upon which to decide the current litigation.

A. The School Funding Cases Provide Factual and Legal Context.[1]

1. *Seattle School District v. State* (*School Funding I*).

In 1978, the Washington Supreme Court decided *Seattle School District No. 1 v. State*, 90 Wn.2d 476, 585 P.2d 71 (1978). Construing Article IX's language, the court cautioned against focusing on specific terms like "ample", "provision" or "education", stating: "Rather these terms are treated as guidelines for giving the Legislature the greatest possible latitude to participate in the full implementation of the constitutional mandate." 90 Wn.2d at 515.

[1] Copies of the three Superior Court School Funding cases (II, III and IV) are attached as Exhibits 1, 2 and 3 to the Clark Declaration.

The court put into context the dicta from *School Funding I* (90 Wn.2d at 517-18) quoted several times in Petitioners' brief:

> The trial court did not, nor do we, deal with the above-mentioned educational concepts as fully definitive of the State's paramount duty. Rather, we hold that they constitute broad guidelines and that the effective teaching and opportunities for learning these essential skills make up the *minimum* of the education that is constitutionally required.
>
> We hold further that the mandate of Const. art. 9 § 1 is addressed to the State and requires, as a first priority, fully sufficient funds for the "general and uniform system of public schools which the Legislature is obligated to establish pursuant to Const. art. 9 § 2. Through this system our children will receive their constitutionally guaranteed education.

Id. at 518. (underlined emphasis added)

Finally, the court cautioned against construing these "guidelines" to require the State to furnish a "total education"; rather, the Legislature's obligation is to provide "a basic program of education." Id. at 519. It rejected the Petitioners' request that more specific judicial guidelines and directives be given the Legislature:

> While the Legislature must *act* pursuant to the constitutional mandate to discharge its duty, the general authority to select the *means* of discharging that duty should be left to the Legislature.

Id. at 520.

2. *Seattle School District v. State* (*School Funding II*).

In 1983, Judge Doran of the Thurston County Superior Court decided the second school funding case. Petitioners claimed, in part, that the statutory program of basic education was constitutionally deficient because it lacked programs for gifted students, extra-curricular activities, large and urban districts and other matters. Judge Doran rejected these claims and ruled that:

> At this time the program, in the opinion of this Court, which the Legislature has determined to be necessary to meet the current needs of the children of this State are found in the Basic Education Act of 1977, the amendment thereto, the Education for All Act of 1971 [special education], the Transitional Bilingual Instruction Act of 1979 and the Remediation Assistance Act passed in 1979.

School Funding II Opinion, pp. 154-55.[2]

A number of Judge Doran's formal Conclusions of Law guide this Court in determining Petitioners' constitutional challenge:

> 6. The State's constitutional duty to make ample provision for the educational program required by Article IX requires that the Legislature establish in law the educational programs and services to which all children are entitled and the formulas or standards by which full state funding of such education can be determined.
>
> ....
>
> 9. The Legislature, under Article IX, Sections 1 and 2, has the power and is required to continually review, evaluate, and revise, if necessary, the educational system of the state and the program of education and its funding in order to meet the current needs of the children of the state.
>
> 10. Biennial appropriations by the Legislature from the State's general fund in support of the basic program of education that the Legislature has determined to be necessary under Article IX, Section 1, of the Constitution provide funding from regular and dependable tax sources.
>
> ....
>
> 12. The system of education created by the Legislature to comply with Article IX, Sections 1 and 2, includes the state statutes governing the provision of education, including the Basic Education Act of 1977 ("BEA"), Levy Lid Act, Education for All Act, Transitional Bilingual Education Act, and Remediation Assistance Act.
>
> ....
>
> 15. The legislative attempt to comply with Article IX is entitled to a strong presumption of constitutionality, and petitioners must prove beyond a reasonable doubt that programs the Legislature has omitted are a constitutional imperative requiring immediate judicial intervention.
>
> 16. The petitioners' burden is not met, for example, where the State represents to the Court that a particular program is still under consideration by the Legislature and that a decision will be made promptly, or where the State represents that a particular problem will be dealt with or a particular program fully funded in a prompt manner.
>
> ....

[2] While not controlling precedent, the Supreme Court has observed that *School Funding II* was "well reasoned." *Brown v. State*, 155 Wn.2d 254, 262, n.2, 119 P.3d 341 (2005).

60. In light of the declaratory relief granted by the Court and the expectation of legislative compliance with that declaration, there is no reason to grant mandatory relief at this time. The Court will leave for another case the determination of whether such relief could be granted without violating the Separation of Powers Doctrine.

3. ***Washington State Special Education Coalition v. State* (*School Funding III*).**

The third school funding decision concerned a challenge to the adequacy of special education funding, one component of the statutory basic education program. Of importance to the case before this Court is Conclusion of Law 1.12, rejecting a "collective wisdom" approach (a collaborative judgment of professionals and experts) to determine the adequacy of education:

> The "collective wisdom" approach to determining the adequacy of funding used in *School Funding I* in the absence of any definition of basic education adopted by the Legislature is not applicable. Funding must be tested against the acts as passed by the Legislature and not by the so-called application of the "collective" wisdom approach.

School Funding III, Findings of Fact and Conclusions of Law at 11-12.

4. ***School Districts' Alliance v. State* (*School Funding IV*).**

The fourth school funding decision was another challenge to the adequacy of special education. Decided on April 12, 2007, Thurston County Superior Court Judge McPhee entered Conclusions of Law that also inform the determination of Petitioners' motion:

> 3. With respect to a challenge under Wash. Const. Art. IX, §§ 1 and 2, a court should presume that an act of the legislature is constitutional; a party challenging a legislative act or statute must prove it unconstitutional beyond a reasonable doubt; the preponderance of evidence standard is applicable to questions of fact and the beyond a reasonable doubt standard is applicable to review of constitutional issues of law; and, the judiciary should defer to the legislature, and restrain its role to providing only broad constitutional guidelines within which the legislature may work.
>
> 4. The legislature has the authority to select the means to discharge its duty under Wash. Const. Art. IX, § 1 and 2.
>
> ....
>
> 17. Dependable and regular funding has never been a constitutional requirement. Rather, revenue for schools must come from a dependable and regular tax source.

B. The Basic Education Act and Related Statutes Define and Fully Fund a Program of Basic Education.

The Basic Education Act was enacted in 1977, before the Supreme Court's decision in *School Funding I*. In his concurring opinion, Justice Utter characterized the Act as "a detailed definition of the educational program to be offered students":

> The Basic Education Act defines the program evolving from the act to include a complex series of goals enumerated therein, and the program requirements deemed necessary to accomplish these goals, as well as the legislative determination of State resources to implement the program. Laws of 1977, 1st Ex. Sess., ch. 359, § 1.

Seattle Sch. Dist. v. State, 90 Wn.2d at 547-48.

The Basic Education Act[3] contains three basic elements: (1) education system goals, (2) educational program requirements, and (3) funding ratio/formula procedures. These statutes emphasize that "opportunities" for education are being provided and funded.

1. Educational System Goals.

As enacted in 1977, the Basic Education Act included the following goals:

> The goal of the Basic Education Act for the schools of the state of Washington set forth I this 1977 amendatory act shall be to provide students with the opportunity to achieve those skills which are generally recognized as requisite to learning. Those skills shall include the ability:
>
> (1) To distinguish, interpret and make use of words, number and other symbols, including sound, colors, shapes and textures;
>
> (2) To organize words and other symbols into acceptable verbal and nonverbal forms of expression, and numbers into their appropriate functions;
>
> (3) To perform intellectual functions such as problem solving, decision making, goal setting, selecting, planning, predicting, experimenting, ordering and evaluating; and
>
> (4) To use various muscles necessary for coordinating physical and mental functions.

Laws of 1977, Ex. Sess., ch. 359, § 2 (formerly RCW 28A.58.752).

In 1993, the goals were amended to provide the following:

[3] RCW 28A.150 *et seq.*

> The goal of the Basic Education Act for the schools of the state of Washington set forth in this chapter shall be to provide students with the opportunity to become responsible citizens, to contribute to their own economic well-being and to that of their families and communities, and to enjoy productive and satisfying lives. To these ends, the goals of each school district, with the involvement of parents and community members, shall be to provide opportunities for all students to develop the knowledge and skills essential to:
>
> (1) Read with comprehension, write with skill, and communicate effectively and responsibly in a variety of ways and settings;
>
> (2) Know and apply the core concepts and principles of mathematics; social, physical, and life sciences; civics and history; geography; arts; and health and fitness;
>
> (3) Think analytically, logically, and creatively, and to integrate experience and knowledge to form reasoned judgments and solve problems; and
>
> (4) Understand the importance of work and how performance, effort, and decisions directly affect future career and educational opportunities.

RCW 28A.150.210.[4] (emphasis added)

2. Educational Program Requirements.

The second element of the Basic Education Act consists of educational program requirements. The Legislature has declared that the goals defined in the previous subsection are satisfied by implementing the following program requirements:

- Instruction in the state's essential academic learning requirements[5] and such other subjects as the school districts determine to be appropriate.
- Total instructional offering of 450 hours for students enrolled in kindergarten.
- Annual average instructional offering of 1,000 hours to students enrolled in grades 1-12.

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[4] The findings of intent that accompanied the 1993 amendment provide in part, "[i]t is the intent of the legislature to provide students the opportunity to achieve at significantly higher levels, and to provide alternative or additional instructional opportunities to help students who are having difficulty meeting the essential academic learning requirements in RCW 28A.630.885." Laws of 1993, ch. 336, § 1.

[5] The essential academic learning requirements are the basic skills related to reading, writing, mathematics, science, and other subject areas derived from the learning goals set forth in RCW 28A.150.210. *See also* RCW 28A.655.060.

- A program accessible for 180 school days per year in such grades as are conducted by a school district, and 180 half-days, or equivalent in kindergarten.

See RCW 28A.150.220. The original 1977 version of the program requirements prescribed instruction in specified academic subjects such as language arts, mathematics, social studies, music, art, health, and physical fitness. Laws of 1977, Ex. Sess., ch. 359, § 3. Legislation in 1993 substituted essential academic learning requirements for discrete classroom subjects.

The Legislature has created other substantive programs that are part of basic education: special education under RCW 28A.155, some degree of student transportation under RCW 28A.160, the learning assistance program under RCW 28A.165, and the transitional bilingual program under RCW 28A.180. Salvi Decl. ¶ 6.

The final link in the substantive instructional program chain concerns the instructional duty of teachers to provide the instruction.

> It is the intended purpose of this section to guarantee that the certificated teaching and administrative staff in each common school district be held accountable for the proper and efficient conduct of classroom teaching in their school which will provide students with the opportunity to achieve those skills which are generally recognized as requisite to learning.

RCW 28A.150.240. (emphasis added)

3. Funding Ratios.

In order to fund the staff providing the substantive content provided above, the third element of the Basic Education Act entails prescribed minimum school staff-to-student ratios and associated formulas. RCW 28A.150.260. Accordingly,

> Basic education shall be considered to be fully funded by those amounts of dollars appropriated by the legislature pursuant to RCW 28A.150.250 and 28A.150.260 to fund those program requirements identified in RCW 28A.150.220 in accordance with the formula and ratios provided in RCW 28A.150.260 and those amounts of dollars appropriated by the legislature to fund the salary requirements of RCW 28A.150.100 and 28A.150.410.

RCW 28A.150.250. (emphasis added)

Moreover, contrary to Petitioners' claim, RCW 28A.150.270 provides that basic education funds include funds that can be used for school construction.[6]

RCW 28A.150.370 lists additional programs for which legislative appropriations must be made (special education) and those for which appropriations may be made (funding for population factors such as urban costs, racial and disadvantaged programs and other special programs). RCW 28A.150.380 provides that education funding is accomplished through biennial (and supplemental) appropriations from the State general fund.

The process by which the State fully funds the costs of the basic education program is explained in paragraphs 8 through 13 of the Salvi Declaration. In anticipation of each biennial funding session of the Legislature, the Executive Branch (through its Office of Financial Management) builds a budget for education. The Office of the Superintendent of Public Instruction (OSPI) contributes to that process by suggesting enhancements above and beyond funding already determined to be needed in anticipation of the ensuing years' educational costs. OSPI is not responsible for establishing what funding levels are needed for the basic education program. Because biennial funding covers the ensuing two years, the education budget necessarily forecasts what will be needed, in part, based on past historical experience. The staff:student ratios and NERC factors[7] contained in the Basic Education Act, plus school district reported and projected enrollment figures, determine and update the costs of basic education. Basic education program costs then are fully funded through annual appropriations in the biennial Appropriations Acts.

Following appropriation, OSPI allocates funding to the school districts. Amounts provided are driven by statutory formulae that comprise reported student enrollment, staffing ratios, salary and benefit calculations and NERCs. The allocation process conforms the

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[6] Additional State funding for school construction also is supplied through capital appropriations. Salvi Decl. ¶ 14.

[7] Non-employee related costs. Staff costs and NERC's are 100% of costs funded under the Basic Education Act. Salvi Decl. ¶ 11.

forecast of costs to actual experience. If more funding is needed, supplemental appropriations are made by the Legislature to ensure full funding of those costs.

The statutes and the appropriations-allocations process described above have been fully funding the basic education program for almost 30 years. In that time, there have been only two challenges to its constitutional adequacy: *School Funding II*, decided twenty-five years ago, and this case. Clark Decl. ¶¶ 3, 14.

C. Washington Learns Initiated a Process of Basic Education Reform That Will Continue into the Next Funded Biennium.

As described above, *School Funding II* charged the State with the obligation to review and reform the program and funding of basic education. The studies mentioned in Petitioners' brief are part of the State's performance of that duty.

As explained in the Salvi Declaration, ¶¶ 18 through 22, Washington Learns was an entity created by the Governor and the Legislature to conduct a top to bottom review of Washington's entire education system, its structure, and its funding. It consisted of a Steering Committee and three advisory committees. The Steering Committee was charged with making policy recommendations to the Legislature and, as part of its comprehensive review, analyzed moving toward a world-class, learner-focused education system. It presented its recommendations to the Legislature on November 15, 2006.

Three advisory committees, the K-12 Education Advisory Committee, the Early Learning Council, and the Higher Education Advisory Committee, advised the Steering Committee. Business people, government officials, educators and several state legislators sat on the advisory committees, including representatives from a number of the constituents of petitioner, Network for Excellence in Washington Schools (NEWS). Funding for a new definition of basic education is one of the issues that was studied and debated. The services which might be provided included elements significantly beyond those required by the basic program of education as it is currently defined and fully funded. Salvi Decl. ¶ 21.

To continue the process of reform, the Legislature endorsed and has acted upon many of the recommendations contained in the Washington Learns' reports, including increased education funding by $1.8 billion. *Id.* ¶ 24. Legislation passed in 2007 also mandates that, by September 2008, the Governor and Legislature will have recommendations about steps to improve the program for basic education and the potential means of fully funding that program. The 2009 biennial funding sessions of the Legislature can then consider those recommendations and pass appropriate legislation.

To order what Petitioners demand--a formal cost study the State is then required to fund--would pre-empt the Legislature's chosen method for both defining and funding the basic program of education. Salvi Decl. ¶ 25. It would force the State to abandon the reform effort conducted for the last two years which, if uninterrupted by Petitioners, will continue the process of reform into 2008 and beyond. *Id.* It will be a tremendous waste of time and effort already invested by the State in favor of a different, complex and expensive process that would be impossible to accomplish in the short time (one year) demanded by Petitioners. *Id.* The State's experience with studies of how to reform the program which is its paramount duty indicates that a one-year deadline to complete such work is much too short. *Id.*

D. Other Evidence Controverts Petitioners' Claim That Washington Underfunds its Basic Education Program.

Petitioners cite to documents and testimony from which they argue the Court should infer the State's failure to fully fund a program of basic education. The facts discussed above contradict that evidence and inference.

The testimony of Dr. Eric Hanushek, a leading national expert on education funding and programs also contradicts Petitioners' evidence. His research confirms that Washington's students rank very high, when compared to student performance elsewhere on nationally credited tests. Hanushek Decl. ¶¶ 16-23. For example, the National Assessment of Education Progress ranks Washington eighth in mathematics. *Id.* The 2007 national "Education Report

Card" gave Washington an "A" in overall school achievement. *Id.* Washington ranked second in the academic achievement of low-income and minority students. *Id.* These results contradict any inference that WASL results demonstrate inadequate funding. Indeed, they confirm that Washington achieves better student outcomes than states that fund more. *Id.* ¶ 17.

Dr. Hanushek's testimony also undercuts the inference that inadequate funding is evidenced by alleged poor student performance. There is no proven, scientific connection between poor student performance and funding levels provided. *Id.* ¶ 15. Indeed, Dr. Hanushek has analyzed states where funding was ordered increased in the (erroneous) expectation that student outcomes would improve and concludes that Washington's experience and that of other states proves that "how" funds are spent is more important than "how much". *Id.* ¶¶ 15 and 26.

Superintendent Bergeson's deposition testimony also raises fact issues about Washington students' performance on testing and the process of funding by Washington. She confirms that Washington is in the top tier of student performance under the National Assessment of Education Progress. Clark Decl. Ex. 10, p. 43. She disputes the suggestion that Washington has fallen behind student performance in other states. *Id.*, p. 44, l. 10 to p. 45, l. 3. She testified that Washington student performance on WASL is continuing to improve (*id.*, p. 49, l. 10 to p. 50, l. 6) and that Washington is, in fact, preparing students to compete in today's world. *Id.* p. 56, ll. 9-23. Finally, she confirms that the Legislature has determined and fully funded the cost of its basic education program, thereby dispelling the need for the cost study demanded by Petitioners. *Id.*, p. 76, l. 13 to p. 77, l. 17.

Finally, the Salvi Declaration, ¶ 16, 20-21, controverts the claim that Washington Learns determined the State has underfunded basic education and the allegation that Washington depends on local government or private entities to supplement state funding.

E. This Case Requires Full Discovery and the Development of a Record Upon Which Constitutional Claims Can Be Decided.

This case is just over four months' old. The defense has issued a comprehensive set of discovery requests that will not produce results until after this Opposition is due. Clark Decl. ¶ 5. Even if Petitioners respond fully, defense counsel will require substantial time to review responses, follow-up with other written requests for discovery and conduct depositions. *Id.* The state of this case is far too undeveloped—as would be expected from the brief time that has passed since its filing. Petitioners admit they have conducted only limited discovery.

To respond to a motion for complete summary judgment, even the marginal one brought herein, will require specific discovery about Petitioners' use of, and reliance upon, the results of WASL testing and the February 2007 study conducted on behalf of the WEA (a member of Petitioner NEWS).[8] *Id.* ¶¶7-8. (The study, like the WASL results, appears to be Petitioners' primary indicators of underfunding.) The study will undoubtedly require rebuttal by both fact and expert witnesses. *Id.* Moreover, the makeup of the Petitioners, parents and their children and a recently formed non-profit organization, whose membership is likely to possess the information, documents and testimony needed, will make discovery cumbersome. *Id.* ¶ 9. Third-party discovery across Washington and in other states will have to be concluded before this case can be decided. *Id.* ¶ 8.

IV. QUESTIONS OF LAW PRESENTED

1. Should this Court define specific terms of Article IX of the state Constitution when the Supreme Court already has done so, holding that the Article's terms are fulfilled by the definition and funding of a program of basic education?

2. Is the Washington program of basic education defined and funded in the Basic Education Act and related state statutes that govern education goals and opportunities

[8] Proof contradicting the inference of underfunding is obviously material to the case. Ramerman Declaration, Exhibit K, is an attempt to offer evidence of underfunding and the defense is entitled to test that proposition.

(RCW 28A.150.210), basic education program requirements and their implementation (RCW 28A.150.220) and the funding of staff and non-staff costs of that basic education program (RCW 28A.150.250 and .260)?

3. Does the existence of genuine and material fact issues preclude summary judgment, particularly when, as here, Petitioners assert constitutional claims that require proof beyond a reasonable doubt.

4. Can the Court award Petitioners a remedy ordering the Legislature regarding the means and methods of fulfilling its constitutional duty?

5. Does Civil Rule 56(f) provide an alternative basis for denying this Motion to allow the State to conduct discovery?

6. Should the Court strike inadmissible exhibits and testimony as well as those sections of Petitioners' brief that are based on inadmissible evidence?

V. EVIDENCE RELIED UPON

Evidence relied on to defeat this Motion includes: the Declarations of Julie Salvi, Eric Hanushek and William G. Clark, and the documents and deposition testimony attached thereto and specifically cited *infra*.

VI. ARGUMENT

The Court should deny the Motion because: (1) the legal meaning and effect of Article IX has been established by the Supreme Court; (2) RCW 28A.150.210 constitutes a revised statement of goals and opportunities, not the substantive content of basic education; (3) substantial evidence precludes a ruling that the State underfunds its program of basic education; (4) the remedy demanded is unavailable as a matter of law; (5) the requested remedy would contravene Washington law, is contrary to recent court decisions in other states and has been proven ineffective; and (6) Petitioners' Motion is based upon inadmissible evidence.

A. Legal Standards Governing Summary Judgment and Constitutional Claims Require Denial of This Motion.

Civil Rule 56(c) mandates that Petitioners demonstrate there is no material fact issue and that they are entitled to judgment as a matter of law. The Court views all evidence and inferences favorable to the non-moving party; all doubts about the existence of factual issues are resolved in Respondent's favor. *Roger Crane & Associates v. Felice*, 74 Wn. App. 769, 875 P.2d 705 (1994). Summary judgment is appropriate only if, based on all evidence submitted, reasonable persons can reach but one conclusion. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 828 P.2d 549 (1992).

In addition to legal principles underlying every summary judgment motion, there is a greater burden on Petitioners in this case. Petitioners must overcome "the strong presumption of constitutionality" in legislative action and statutes and provide proof beyond a reasonable doubt[9] that whatever Petitioners claim is lacking from the program or its funding "are constitutional imperatives requiring immediate judicial intervention." *School Funding II*, Conc. of Law 15 (1983); *accord*, *Tunstall v. Bergeson*, 141 Wn.2d 201, 220, 5 P.3d 691 (2000):

> This "demanding standard of review" [proof beyond a reasonable doubt] is justified because, as a co-equal branch of government that is sworn to uphold the constitution, we assume the Legislature considered the constitutionality of its enactments and afford great deference to its judgment. Additionally, the Legislature speaks for the people and we are hesitant to strike a duly enacted statute unless fully convinced...that the statute violates the constitution.

The elevated quantum of proof makes it more difficult to obtain summary judgment. "[T]he judge must view the evidence presented through the prism of the substantive evidentiary burden." *Adams v. Allen*, 56 Wn. App. 383, 393, 783 P.2d 635 (1989). Even if

[9] The quantum of proof relates to more than what facts are proven; the standard is met only if "argument and research show that there is no reasonable doubt that the statute violates the constitution." *Amunrud v. Bd. of Appeals*, 158 Wn.2d 208, 215, 13 P.3d 571 (2006); *Larson v. Seattle Popular Monorail Auth.*, 156 Wn.2d 752, 757, 13 P.3d 892 (2006).

there are no factual disputes, the moving party may still not meet the substantive requirements inherent in its claim because of the burden of proof. *See Sedwick v. Gwinn*, 73 Wn. App. 879, 873 P.2d 528 (1994).

Moreover, Petitioners present a constitutional challenge to state legislation.[10] One way to do so is a "facial" challenge, requiring Petitioners to prove that there are "no set of circumstances" where the basic education program, funding or appropriations statutes can be constitutionally applied. *Wash. State Republican Party v. Wash. State Public Disclosure Comm'n*, 1414 Wn.2d 245, 282, n.14, 4 P.3d 808 (2000); *Tunstall*, 141 Wn.2d 220-21. If not a facial challenge, Petitioners must prove that these statutes are unconstitutional "as applied" in the specific factual context alleged. *Id.*

Finally, Petitioners' burden is insurmountable because the Legislature is pursuing comprehensive education reform through Washington Learns and 2007 legislation.

> The Petitioners' burden is not met, for example, where the State represents to the Court that a particular program is still under consideration by the Legislature and that a decision will be made promptly, or where the State represents that a particular problem will be dealt with or a particular program fully funded in a prompt manner.

School Funding II, Conc. of Law 16 (1983).

B. The Supreme Court Already Has Determined the Legal Effect of Article IX.

Petitioners' first requested ruling is for adoption of the dictionary definition of the terms "paramount", "ample" and "all". The Court need not do so as all these terms have been defined by the Supreme Court. Paramount and ample were specifically defined in *Seattle Sch. Dist. v. State*. "All children" was the subject matter of *Tunstall v. Bergeson*, 141 Wn.2d at

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[10] In *School Funding I*, 90 Wn.2d at 528, the Court applied the "normal civil burden of proof" rather than "the highest burden of proof." This would appear in conflict with the Supreme Court cases holding that proof beyond a reasonable doubt was necessary to declare legislative actions or statutes concerning education unconstitutional. *E.g., Tunstall, supra,* 141 Wn.2d at 220. Petitioners clearly are attacking either or both the education program or funding statutes. Moreover, as Judge McPhee ruled in *School Funding IV*, preponderance governs the resolution of civil evidentiary issues while, even if that evidence establishes facts supporting Petitioners' claims, the Court still must be convinced that there is no reasonable doubt of unconstitutionality. Conclusion of Law No. 3, *infra* at p. 5.

220 (the State is not obligated to provide an identical education to all children in the State regardless of the circumstances in which they are found).

In fact, our Supreme Court has construed the legal effect of the entire passage of Article IX, § 1 where these terms appear. The duty imposed on the State by this provision is simply to define and fully fund a program of basic education. *Seattle School District*, 90 Wn.2d at 520; *School Funding II*, Conc. of Law 6. In assessing the fulfillment of that duty, this Court should bear in mind that the State provides "opportunities", not guaranteed outcomes, for education. As stated by Judge Talmadge in a concurring opinion:

> The Washington Constitution effectively offers children in this state a constitutional right to *educational opportunity*. The state has the paramount duty to make ample provision for this opportunity in the education of its children. The Legislature's paramount duty is to define this educational opportunity in the establishment of an educational system and to fund it. Individual children, their parents, and local school districts each have standing to compel the Legislature to implement this constitutional mandate. But the courts cannot prescribe an individual right to a specific form of education.

Tunstall v. Bergeson, 141 Wn.2d at 236.

A ruling defining terms is superfluous in light of the above decisions.

C. RCW 28A.150.210[11] Does Not Define Substantive Content for Basic Education.

In an effort to bolster their contention that WASL results prove unconstitutional underfunding, Petitioners mischaracterize the origins, content and significance of RCW 28A.150.210. First, the statute was not passed, or referred to, as the Basic Education Act of 1993. Clark Decl. Ex. 10, p. 22, ll. 12-25. Nor was it enacted pursuant to *School Funding I*: a predecessor statement of "goals" had existed since 1977 when the Basic Education Act was passed. Section .210 was an amendment of that provision. (*Infra* at pp. 6-7).

Contrary to Petitioners' contention, this statute does not define the content of basic education. It is not a guarantee of student achievement or success. In language left out of

[11] The 2007 legislative session has amended .210 to replace the statement of goals. Ex. 11 to Clark Decl. Though Petitioners' Motion thus addresses a superseded statute, the new provision is substantially the same.

Petitioners' quote, .210 explicitly provides that "opportunities" to become educated are what school districts are expected to offer. Creating opportunities, not prescribing educational content, is the expressed legislative intent behind this statute.

Finally, this statute cannot be exalted over, or removed from the context of, the balance of RCW 28A.150. Program requirements and funding are addressed in .220, .250 and .260. The Court should reject the ruling requested as to .210.

D. Substantial Issues of Material Fact Preclude Summary Judgment Regarding Constitutional Compliance.

Petitioners' evidence consists of general statements made historically, recent deposition testimony, and allegedly deficient student test results in the WASL. Taken as a whole, this evidence, even if undisputed, does not prove beyond a reasonable doubt that the State has violated its duty under Article IX.

Statements that the State should "do more" or "is not doing enough" or "the system is failing our children" are not proof beyond a reasonable doubt of underfunding. Testimony that funding is not "ample"[12] cannot overcome the presumed validity of a statute that declares that implementation of the program and the funding formulae in RCW 28A.150, .250 and .260 shall constitute "full funding". The Salvi Declaration confirms that the State has implemented both the program and funding that, by law, is full funding of a basic education program.

Petitioners' evidence is also fatally defective due to the lack of a proven connection between unsatisfactory student achievement on the WASL and inadequate state funding. Petitioners have produced no witness, expert or fact or document, that establishes this link.

[12] Petitioners cite deposition testimony about whether "ample" funds are provide for educating high school students and a quote from a Seattle newspaper attributed to Governor Gregoire. Even if there was a foundation to regard these as admissions—and there is none because neither the Superintendent nor the Governor are parties to the case—such statements are not deemed binding or conclusive on an issue. *Hurst v. Wash. Canners Co-Op*, 50 Wn.2d 729, 733-34, 314 P.2d 651 (1957). This is true even if a witness is produced as a spokesperson on an issue pursuant to CR 30(b)(6). *Casper v. Esteb Enterprises, Inc.*, 119 Wn. App. 759, 767, 82 P.3d 1223 (2004). No such depositions have been taken.

Without proof of such a connection, there is no justification, in fact or law, for a conclusions that funding is constitutionally deficient.

The defense has brought forth specific facts that contest Petitioners' evidence. The Basic Education Act itself declares that implementation of its statutory program and funding of the costs of basic education is "full funding". RCW 28A.150.250. These statutes are followed each biennium to fund the actual costs of the basic education program. Salvi Decl. ¶¶ 5-8. Superintendant Bergeson[13] and Dr. Hanushek testified that student test performance levels in Washington are superior to those in the majority of other states—including several that spend more and get less in outcomes for students. Clark Decl. Ex. 10, p. 43; Hanushek Decl. ¶ 17. Finally, the defense testimony about Washington Learns shows that it is a reform initiative to explore taking education in Washington to a different level—beyond the basic education program currently in place. Salvi Decl. ¶¶ 20-21. It is not an indictment of Washington's performance of constitutional obligations, as claimed by Petitioners.

Finally, Petitioners erroneously contend that the State does not fund school construction. RCW 28A.150.270 provides that funds for this purpose can come out of the basic education allocation. School construction projects also are state-funded as part of the Biennial Capital Appropriations Acts. Salvi Decl. ¶ 14.

E. The Remedy Requested Is Unavailable Under Washington Law.

At the close of their brief, Petitioners make the cavalier and unsupported argument that this Court should avoid a protracted litigation process and order the State to implement the remedy prayed for in the Petition: a cost study for basic education and a plan for how the State will fund it. (Opening Brief, p. 21). Petitioners erroneously call this remedy

[13] Petitioners caution that a party cannot create issues of fact with an affidavit that contradicts the party's deposition testimony. This only applies to contradictory testimony by the same person. *McCormick v. Lake Wash. School Dist.*, 99 Wn. App. 107, 992 P.2d 511 (1992). It does not preclude evidence from other sources that supports the allegedly inconsistent testimony of a witness. *Sedwick v. Gwinn, supra*, 73 Wn. App. At 888. Even if the same person provides contradictory statements, one is rejected in favor of the other only if there is a clear and material contradiction. *Sun Mountain Productions, Inc. v. Pierre*, 84 Wn. App. 608, 929 P.2d 494 (1997).

"conservative and narrowly tailored" and make the wholly-unsubstantiated claim that such an approach has been the approach in other cases across the nation.

Petitioners' preferred remedy exemplifies the fundamental flaw in their entire Motion. They would dispense with discovery, avoid trial on the merits through a summary process based on a woefully undeveloped record and embark the State on a course that is designed to be costly, that will preempt the Legislature's chosen means of reform and that has no demonstrable likelihood of improving outcomes for Washington's students.

Petitioners' preemptive remedy is bad law: in Washington, the Legislature has the right to devise and implement the methods and means by which it discharges its Article IX responsibilities. *McGowan v. State*, 148 Wn.2d 278, 293, 60 P.3d 67 (2002); *Tunstall v. Bergeson*, 141 Wn.2d 201, 223, 5 P.3d 691 (2000); *Seattle School District v. State*, 90 Wn.2d 476, 519-20 (1978).

Petitioners' preemptive remedy is bad science: expert analysis of experience nationwide demonstrates that increased funding does not produce better outcomes for students. Hanushek Decl. ¶¶ 15, 17 and 26. Moreover, there is no demonstrable connection between poor student test performances and allegedly inadequate funding.[14] *Id.*

Petitioners' preemptive remedy has not worked in other states. *Id.* Indeed, the recent decisions of the highest courts in other states show the trend is for courts to defer to the other branches of government to define and implement education programs, funding and reform. Clark Decl. ¶ 13. For example, in one case cited by Petitioners, New York's Court of Appeals reversed the trial court's order that a cost study's conclusion about adequate funding be substituted for the legislature's reasonable determination of what those costs were, and how to fund them:

[14] Dr. Hanushek notes that this was particularly true in New Jersey, where litigation has been ongoing for 30 years. Hanushek Decl., ¶ 26.

> The role of the courts is not, as the Supreme Court assumed, to determine the best way to calculate the cost of a sound basic education in New York City schools, but to determine whether the State's proposed calculation of that cost is rational.

Campaign for Fiscal Equity, Inc. v. State, 8 N.Y.3d 14, 27 (2006). (Clark Decl. Ex. 1)

The national trend has been to dismiss constitutional claims that the state underfunds education because the other branches of government have both the responsibility and the right to make education policy and funding decisions. *See, e.g., Nebraska Coalition for Educational Equity v. Heineman*, 273 Nebr. 531 (May 11, 2007); *Oklahoma Education Ass'n v. State*, 2007 Okla. 30 (May 8, 2007); *Young v. Williams*, _____ Ky. _____ (February 13, 2007). (Clark Decl. Exs. 2, 3 and 4)

Finally, the requested remedy is tantamount to issuing a writ of mandamus or a mandatory injunction. Petitioners have not briefed their entitlement to such extraordinary relief. Nor do they qualify for it under appropriate authorities. *See, e.g., Eugster v. City of Spokane*, 118 Wn.2d 383, 76 P.2d 741 (2003) (writs of mandamus) and *San Juan County v. No New Gas Tax*, 2007 WL 1218207 (2007) (preliminary injunction).

F. Civil Rule 56(f) Also Mandates Denial of the Motion to Permit Full Discovery on Material Issues.

An alternative basis for denying summary judgment is CR 56(f). Under that rule, the court refuses or continues the motion to permit sufficient time to take depositions or to conduct discovery. *Butler v. Joy*, 116 Wn. App. 291, 299, 65 P.3d 671 (2003). The court's primary consideration is justice, *id.* at 675, and the modern trend under CR 56(f) is to apply court rules to allow cases to be decided on their merits. *Weeks v. Chief of Wash. State Patrol*, 96 Wn.2d 893, 895-96, 639 P.2d 732 (1982).

To justify denial or continuance under CR 56(f), the State only need show: (1) a good reason for any delay in obtaining evidence; (2) an indication of what evidence would be established; and (3) that the evidence will raise a genuine issue of fact. *Coggle v. Snow*, 56

Wn. App. 499, 5080, 784 P.2d 544 (1990). As shown in the Clark Declaration, ¶¶ 3 through 10, all factors are present in this case.

First, there has been no delay in pursuing discovery. The case was started only four months ago. The State has propounded comprehensive discovery requests that are unanswered as of the time of filing this Opposition. The state has deferred taking depositions until it has had the opportunity to assess the adequacy and substance of Petitioners' responses to written discovery. The cutoff of discovery is nearly one year way: May12, 2008.

The discovery outstanding includes requests that Petitioners substantiate the allegations that the State fails to fund basic education in compliance with Article IX. (Clark Decl. Ex. 4) Their anticipated responses should include documents that relate to their (yet unproven) contention that WASL test results are due to inadequate State funding. Indeed, as one of Petitioners' constituent members has repeatedly indicated, the WEA opposes "using the WASL test to make high stakes decisions about students and schools." *Id.* Ex. 5. How can Petitioners claim that WASL test results decide the adequacy of State funding, but are useless for all other "high stakes" decisions about students and schools? Allowing discovery will permit the defense to test the credibility of reliance on WASL test results to establish liability.

Another area of needed discovery concerns the WEA-sponsored study, published in February 2007 and relied upon by Petitioners to support their Motion (Opening Brief, p. 7, n.8 and p. 21, n.42). This study was done by a non-party, out-of-state consultant, which means that time-consuming, third-party discovery of this outfit will have to occur before the State has a chance to evaluate and rebut this potential evidence. Moreover, an expert will have to analyze and rebut this voluminous work. That will take many months to accomplish.

The third requirement—that the discovered evidence is material—is satisfied because the two examples provided above address Petitioners' claim that basic education is

underfunded and, more specifically, their assumption that poor student performance on the WASL is proof of underfunding.

Finally, fully dispositive motions in this case of paramount public interest should be deferred until the close of discovery. The factual and legal issues are too complex to be decided on an incomplete record that typically accompanies summary disposition of entire cases.

G. The Court Should Strike Petitioners' Inadmissible Evidence.

Petitioners are obliged to support their case based on admissible evidence from competent sources. *McKee v. Am. Home Products Corp.*, 113 Wn.2d 701, 706, 782 P.2d 1045 (1989). Affidavits offered in support of summary judgment must conform to what the affiant would be permitted to testify at trial. *Blomster v. Nordstrom, Inc.*, 103 Wn. App. 252, 11 P.3d 883 (2000). Inadmissible portions of affidavits are disregarded. *Wash. Public Utility Districts v. PUD No. 1 of Clallam Cy.*, 112 Wn.2d 1, 17, 771 P.2d 701 (1989).

Respondent moves to strike Exhibits K and O of the Ramsey Ramerman Declaration and ¶ 4 of the Edmund Robb Declaration because neither affiant is competent to testify regarding the authenticity or admissibility of the documents in question. An attorney, Mr. Robb has no foundation or basis to testify about the substance, meaning and effect of documents he neither prepared, assisted in preparing and which concern a subject matter (education funding) that he has no demonstrated expertise in. *See Wilson v. Steinbach*, 98 Wn.2d 434, 438-39, 656 P.2d 1030 (1982).

Exhibits K and O to the Ramerman Declaration are a newspaper article (purporting to quote Governor Gregoire) and the WEA consultants' study. Mr. Ramerman authored neither document. He has no first-hand knowledge of their creation or contents. Both are also hearsay; in fact, both contain multiple layers of hearsay. ER 805. Similarly, the defense moves to strike the excerpted remarks of former Governors as hearsay and so remote in time

that they are irrelevant as well. The Court should, therefore, exclude Ramerman Declaration Exhibits G, H, I, J, K and O, and ¶ 4 of the Robb Declaration.

Exclusion of the above should also result in striking from the record any references to inadmissible evidence in Petitioners' brief. The Court should strike from that brief: p. 6, ll. 5-23 (discussion of Exhibits G, H, I and J of Ramerman Declaration); p. 7, n.18 (Exhibit O of Ramerman Declaration); p. 19, ll. 17-20 and n.40 (Exhibit K of Ramerman Declaration); and p. 17, l. 22 to p. 18, l. 7, p. 21, n.42 (Robb Declaration, ¶ 4).

DATED this 21st day of May, 2007.

ROBERT M. MCKENNA
Attorney General

WILLIAM G. CLARK, WSBA #9234
Assistant Attorney General
Attorneys for Respondent

PROOF OF SERVICE

I certify that I served a copy of this document on all parties or their counsel of record on the date below as follows:

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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 21st day of May, 2007, at Seattle, Washington

Agnes Roche

AGNES ROCHE

THE HONORABLE PARIS K. KALLAS

STATE OF WASHINGTON
KING COUNTY SUPERIOR COURT

MATHEW & STEPHANIE McCLEARY, on their own and on behalf of KELSEY & CARTER McCLEARY, their two children in Washington's public schools; ROBERT & PATTY VENEMA, on their own behalf and on behalf of HALIE & ROBBIE VENEMA, their two children in Washington's public schools; and NETWORK FOR EXCELLENCE IN WASHINGTON SCHOOLS ("NEWS"), a state-wide coalition of community groups, public school districts, and education organizations,

Petitioners,

v.

STATE OF WASHINGTON,

Respondent.

NO. 07-2-02323-2 SEA

RESPONDENT'S OPPOSITION TO MOTION FOR SUMMARY JUDGMENT ON LIABILITY AND REMEDY--**ERRATA PAGE AND CORRECTED OPPOSITION BRIEF**

Respondent's Opposition to Motion for Summary Judgment on Liability and Remedy contained errors with respect to exhibit references on page 21, line 4 and with respect to ordering of case citations and exhibit references on page 21, lines 7-10. The corrected exhibit references and ordering of case citations, indicated in bold type, are as follows:

Page 21, line 4:

Campaign for Fiscal Equity, Inc. v. State, 8 N.Y.3d 14, 27 (2006). (Clark Decl. Ex. **6**)

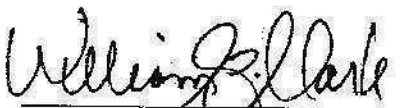
Page 21, lines 7-10:

See, e.g., ***Young v. Williams*, _____ Ky. _____ (February 13, 2007);** *Oklahoma Education Ass'n v. State*, 2007 Okla. 30 (May 8, 2007); ***Nebraska Coalition for Educational Equity v. Heineman*, 273 Nebr. 531 (May 11, 2007).** (Clark Decl. Exs. **7, 8, 9**)

A corrected copy of Respondent's Opposition to Motion for Summary Judgment on Liability and Remedy is attached hereto as Attachment A.

DATED this 23d day of May, 2007.

ROBERT M. MCKENNA
Attorney General



WILLIAM G. CLARK, WSBA #9234
Assistant Attorney General
Attorneys for Respondent

PROOF OF SERVICE

I certify that I served a copy of the foregoing Errata Page, including a corrected copy of Respondent's Opposition brief attached thereto as Attachment A, on all parties or their counsel of record on the date below as follows:

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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 23rd day of May, 2007, at Seattle, Washington

Agnes Roche

AGNES ROCHE

ATTACHMENT A

THE HONORABLE PARIS K. KALLAS

STATE OF WASHINGTON
KING COUNTY SUPERIOR COURT

MATHEW & STEPHANIE McCLEARY, on their own and on behalf of KELSEY & CARTER McCLEARY, their two children in Washington's public schools; ROBERT & PATTY VENEMA, on their own behalf and on behalf of HALIE & ROBBIE VENEMA, their two children in Washington's public schools; and NETWORK FOR EXCELLENCE IN WASHINGTON SCHOOLS ("NEWS"), a state-wide coalition of community groups, public school districts, and education organizations,

Petitioners,

v.

STATE OF WASHINGTON,

Respondent.

NO. 07-2-02323-2 SEA

RESPONDENT'S OPPPOSITION TO MOTION FOR SUMMARY JUDGMENT ON LIABILITY AND REMEDY

(CORRECTED)

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I. INTRODUCTION

On January 11, 2007, Petitioners filed this lawsuit, claiming the State is not meeting its constitutional obligation to fully fund a program of basic education for Washington's students. Though styled a Motion "concerning legal interpretation", Petitioners ask the Court to rule that the State under funds basic education (the liability claim pleaded in their Petition) and to issue an extraordinary writ or mandatory injunction, imposing the remedy sought in the Petition.

Summary judgment is inappropriate for at least the following reasons:

1. The requested definition of terms appearing in Article IX of the state constitution is improper. The Supreme Court already has interpreted and construed Article IX's terms to impose a duty to define and fund a basic education program for Washington's school children.

2. Contrary to Petitioners' argument, RCW 28A.150.210 does not define the content of basic education, but is merely an amended statement of goals and opportunities, with the program and funding of basic education defined in other statutes.

3. Genuine and material factual issues permeate the issue of liability--whether the State has fulfilled its constitutional duty to fund a program of basic education. Petitioners also must prove their claim beyond a reasonable doubt.

4. The remedy sought--mandating the Legislature to conduct a study and report back to the Court in one year—would be error because the means and methods of fulfilling constitutional duties are the Legislature's exclusive prerogative.

5. Even if it had merit, Civil Rule 56(f) justifies denial of the Motion to allow Respondent to conduct discovery and prepare the defense of a case of this magnitude and potential impact on educational policy and funding.

Finally, Petitioners support their Motion with incompetent evidence that should be stricken.

II. RELIEF REQUESTED

Respondent requests the Court to strike portions of the declarations of Ramsey Ramerman and Edmund Robb, to deny the Motion for Summary Judgment and to order that, if liability is proven, the Court's remedy will not mandate how the Legislature is to fulfill its constitutional duty under Article IX.

III. STATEMENT OF PERTINENT FACTS

The factual history important to this Motion includes: (1) four Washington court decisions concerning school funding; (2) the provisions of the Basic Education Act and related statutes that define and fully fund the State's program of basic education; (3) the biennial process whereby the costs of the program are appropriated and allocated to the school districts; (4) the education program and funding reform process initiated by Washington Learns and its continuation through laws passed in the just-concluded biennial legislative session; and (5) the significantly undeveloped state of a record upon which to decide the current litigation.

A. The School Funding Cases Provide Factual and Legal Context.[1]

1. *Seattle School District v. State* (*School Funding I*).

In 1978, the Washington Supreme Court decided *Seattle School District No. 1 v. State*, 90 Wn.2d 476, 585 P.2d 71 (1978). Construing Article IX's language, the court cautioned against focusing on specific terms like "ample", "provision" or "education", stating: "Rather these terms are treated as guidelines for giving the Legislature the greatest possible latitude to participate in the full implementation of the constitutional mandate." 90 Wn.2d at 515.

[1] Copies of the three Superior Court School Funding cases (II, III and IV) are attached as Exhibits 1, 2 and 3 to the Clark Declaration.

The court put into context the dicta from *School Funding I* (90 Wn.2d at 517-18) quoted several times in Petitioners' brief:

> The trial court did not, nor do we, deal with the above-mentioned educational concepts as fully definitive of the State's paramount duty. Rather, we hold that they constitute broad guidelines and that the effective teaching and opportunities for learning these essential skills make up the *minimum* of the education that is constitutionally required.
>
> We hold further that the mandate of Const. art. 9 § 1 is addressed to the State and requires, as a first priority, fully sufficient funds for the "general and uniform system of public schools which the Legislature is obligated to establish pursuant to Const. art. 9 § 2. Through this system our children will receive their constitutionally guaranteed education.

Id. at 518. (underlined emphasis added)

Finally, the court cautioned against construing these "guidelines" to require the State to furnish a "total education"; rather, the Legislature's obligation is to provide "a basic program of education." Id. at 519. It rejected the Petitioners' request that more specific judicial guidelines and directives be given the Legislature:

> While the Legislature must *act* pursuant to the constitutional mandate to discharge its duty, the general authority to select the *means* of discharging that duty should be left to the Legislature.

Id. at 520.

2. *Seattle School District v. State* (*School Funding II*).

In 1983, Judge Doran of the Thurston County Superior Court decided the second school funding case. Petitioners claimed, in part, that the statutory program of basic education was constitutionally deficient because it lacked programs for gifted students, extra-curricular activities, large and urban districts and other matters. Judge Doran rejected these claims and ruled that:

> At this time the program, in the opinion of this Court, which the Legislature has determined to be necessary to meet the current needs of the children of this State are found in the Basic Education Act of 1977, the amendment thereto, the Education for All Act of 1971 [special education], the Transitional Bilingual Instruction Act of 1979 and the Remediation Assistance Act passed in 1979.

School Funding II Opinion, pp. 154-55.[2]

A number of Judge Doran's formal Conclusions of Law guide this Court in determining Petitioners' constitutional challenge:

> 6. The State's constitutional duty to make ample provision for the educational program required by Article IX requires that the Legislature establish in law the educational programs and services to which all children are entitled and the formulas or standards by which full state funding of such education can be determined.
>
> ....
>
> 9. The Legislature, under Article IX, Sections 1 and 2, has the power and is required to continually review, evaluate, and revise, if necessary, the educational system of the state and the program of education and its funding in order to meet the current needs of the children of the state.
>
> 10. Biennial appropriations by the Legislature from the State's general fund in support of the basic program of education that the Legislature has determined to be necessary under Article IX, Section 1, of the Constitution provide funding from regular and dependable tax sources.
>
> ....
>
> 12. The system of education created by the Legislature to comply with Article IX, Sections 1 and 2, includes the state statutes governing the provision of education, including the Basic Education Act of 1977 ("BEA"), Levy Lid Act, Education for All Act, Transitional Bilingual Education Act, and Remediation Assistance Act.
>
> ....
>
> 15. The legislative attempt to comply with Article IX is entitled to a strong presumption of constitutionality, and petitioners must prove beyond a reasonable doubt that programs the Legislature has omitted are a constitutional imperative requiring immediate judicial intervention.
>
> 16. The petitioners' burden is not met, for example, where the State represents to the Court that a particular program is still under consideration by the Legislature and that a decision will be made promptly, or where the State represents that a particular problem will be dealt with or a particular program fully funded in a prompt manner.
>
> ....

[2] While not controlling precedent, the Supreme Court has observed that *School Funding II* was "well reasoned." *Brown v. State*, 155 Wn.2d 254, 262, n.2, 119 P.3d 341 (2005).

60. In light of the declaratory relief granted by the Court and the expectation of legislative compliance with that declaration, there is no reason to grant mandatory relief at this time. The Court will leave for another case the determination of whether such relief could be granted without violating the Separation of Powers Doctrine.

3. *Washington State Special Education Coalition v. State* (*School Funding III*).

The third school funding decision concerned a challenge to the adequacy of special education funding, one component of the statutory basic education program. Of importance to the case before this Court is Conclusion of Law 1.12, rejecting a "collective wisdom" approach (a collaborative judgment of professionals and experts) to determine the adequacy of education:

> The "collective wisdom" approach to determining the adequacy of funding used in *School Funding I* in the absence of any definition of basic education adopted by the Legislature is not applicable. Funding must be tested against the acts as passed by the Legislature and not by the so-called application of the "collective" wisdom approach.

School Funding III, Findings of Fact and Conclusions of Law at 11-12.

4. *School Districts' Alliance v. State* (*School Funding IV*).

The fourth school funding decision was another challenge to the adequacy of special education. Decided on April 12, 2007, Thurston County Superior Court Judge McPhee entered Conclusions of Law that also inform the determination of Petitioners' motion:

> 3. With respect to a challenge under Wash. Const. Art. IX, §§ 1 and 2, a court should presume that an act of the legislature is constitutional; a party challenging a legislative act or statute must prove it unconstitutional beyond a reasonable doubt; the preponderance of evidence standard is applicable to questions of fact and the beyond a reasonable doubt standard is applicable to review of constitutional issues of law; and, the judiciary should defer to the legislature, and restrain its role to providing only broad constitutional guidelines within which the legislature may work.
>
> 4. The legislature has the authority to select the means to discharge its duty under Wash. Const. Art. IX, § 1 and 2.
>
> ....
>
> 17. Dependable and regular funding has never been a constitutional requirement. Rather, revenue for schools must come from a dependable and regular tax source.

B. The Basic Education Act and Related Statutes Define and Fully Fund a Program of Basic Education.

The Basic Education Act was enacted in 1977, before the Supreme Court's decision in *School Funding I*. In his concurring opinion, Justice Utter characterized the Act as "a detailed definition of the educational program to be offered students":

> The Basic Education Act defines the program evolving from the act to include a complex series of goals enumerated therein, and the program requirements deemed necessary to accomplish these goals, as well as the legislative determination of State resources to implement the program. Laws of 1977, 1st Ex. Sess., ch. 359, § 1.

Seattle Sch. Dist. v. State, 90 Wn.2d at 547-48.

The Basic Education Act[3] contains three basic elements: (1) education system goals, (2) educational program requirements, and (3) funding ratio/formula procedures. These statutes emphasize that "opportunities" for education are being provided and funded.

1. Educational System Goals.

As enacted in 1977, the Basic Education Act included the following goals:

> The goal of the Basic Education Act for the schools of the state of Washington set forth I this 1977 amendatory act shall be to provide students with the opportunity to achieve those skills which are generally recognized as requisite to learning. Those skills shall include the ability:
>
> (1) To distinguish, interpret and make use of words, number and other symbols, including sound, colors, shapes and textures;
>
> (2) To organize words and other symbols into acceptable verbal and nonverbal forms of expression, and numbers into their appropriate functions;
>
> (3) To perform intellectual functions such as problem solving, decision making, goal setting, selecting, planning, predicting, experimenting, ordering and evaluating; and
>
> (4) To use various muscles necessary for coordinating physical and mental functions.

Laws of 1977, Ex. Sess., ch. 359, § 2 (formerly RCW 28A.58.752).

In 1993, the goals were amended to provide the following:

[3] RCW 28A.150 *et seq.*

> The goal of the Basic Education Act for the schools of the state of Washington set forth in this chapter shall be to provide students with the opportunity to become responsible citizens, to contribute to their own economic well-being and to that of their families and communities, and to enjoy productive and satisfying lives. To these ends, the goals of each school district, with the involvement of parents and community members, shall be to provide opportunities for all students to develop the knowledge and skills essential to:
>
> (1) Read with comprehension, write with skill, and communicate effectively and responsibly in a variety of ways and settings;
>
> (2) Know and apply the core concepts and principles of mathematics; social, physical, and life sciences; civics and history; geography; arts; and health and fitness;
>
> (3) Think analytically, logically, and creatively, and to integrate experience and knowledge to form reasoned judgments and solve problems; and
>
> (4) Understand the importance of work and how performance, effort, and decisions directly affect future career and educational opportunities.

RCW 28A.150.210.[4] (emphasis added)

2. Educational Program Requirements.

The second element of the Basic Education Act consists of educational program requirements. The Legislature has declared that the goals defined in the previous subsection are satisfied by implementing the following program requirements:

- Instruction in the state's essential academic learning requirements[5] and such other subjects as the school districts determine to be appropriate.
- Total instructional offering of 450 hours for students enrolled in kindergarten.
- Annual average instructional offering of 1,000 hours to students enrolled in grades 1-12.

---

[4] The findings of intent that accompanied the 1993 amendment provide in part, "[i]t is the intent of the legislature to provide students the opportunity to achieve at significantly higher levels, and to provide alternative or additional instructional opportunities to help students who are having difficulty meeting the essential academic learning requirements in RCW 28A.630.885." Laws of 1993, ch. 336, § 1.

[5] The essential academic learning requirements are the basic skills related to reading, writing, mathematics, science, and other subject areas derived from the learning goals set forth in RCW 28A.150.210. *See also* RCW 28A.655.060.

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- A program accessible for 180 school days per year in such grades as are conducted by a school district, and 180 half-days, or equivalent in kindergarten.

See RCW 28A.150.220. The original 1977 version of the program requirements prescribed instruction in specified academic subjects such as language arts, mathematics, social studies, music, art, health, and physical fitness. Laws of 1977, Ex. Sess., ch. 359, § 3. Legislation in 1993 substituted essential academic learning requirements for discrete classroom subjects.

The Legislature has created other substantive programs that are part of basic education: special education under RCW 28A.155, some degree of student transportation under RCW 28A.160, the learning assistance program under RCW 28A.165, and the transitional bilingual program under RCW 28A.180. Salvi Decl. ¶ 6.

The final link in the substantive instructional program chain concerns the instructional duty of teachers to provide the instruction.

> It is the intended purpose of this section to guarantee that the certificated teaching and administrative staff in each common school district be held accountable for the proper and efficient conduct of classroom teaching in their school which will provide students with the opportunity to achieve those skills which are generally recognized as requisite to learning.

RCW 28A.150.240. (emphasis added)

3. Funding Ratios.

In order to fund the staff providing the substantive content provided above, the third element of the Basic Education Act entails prescribed minimum school staff-to-student ratios and associated formulas. RCW 28A.150.260. Accordingly,

> Basic education shall be considered to be fully funded by those amounts of dollars appropriated by the legislature pursuant to RCW 28A.150.250 and 28A.150.260 to fund those program requirements identified in RCW 28A.150.220 in accordance with the formula and ratios provided in RCW 28A.150.260 and those amounts of dollars appropriated by the legislature to fund the salary requirements of RCW 28A.150.100 and 28A.150.410.

RCW 28A.150.250. (emphasis added)

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Moreover, contrary to Petitioners' claim, RCW 28A.150.270 provides that basic education funds include funds that can be used for school construction.[6]

RCW 28A.150.370 lists additional programs for which legislative appropriations must be made (special education) and those for which appropriations may be made (funding for population factors such as urban costs, racial and disadvantaged programs and other special programs). RCW 28A.150.380 provides that education funding is accomplished through biennial (and supplemental) appropriations from the State general fund.

The process by which the State fully funds the costs of the basic education program is explained in paragraphs 8 through 13 of the Salvi Declaration. In anticipation of each biennial funding session of the Legislature, the Executive Branch (through its Office of Financial Management) builds a budget for education. The Office of the Superintendent of Public Instruction (OSPI) contributes to that process by suggesting enhancements above and beyond funding already determined to be needed in anticipation of the ensuing years' educational costs. OSPI is not responsible for establishing what funding levels are needed for the basic education program. Because biennial funding covers the ensuing two years, the education budget necessarily forecasts what will be needed, in part, based on past historical experience. The staff:student ratios and NERC factors[7] contained in the Basic Education Act, plus school district reported and projected enrollment figures, determine and update the costs of basic education. Basic education program costs then are fully funded through annual appropriations in the biennial Appropriations Acts.

Following appropriation, OSPI allocates funding to the school districts. Amounts provided are driven by statutory formulae that comprise reported student enrollment, staffing ratios, salary and benefit calculations and NERCs. The allocation process conforms the

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[6] Additional State funding for school construction also is supplied through capital appropriations. Salvi Decl. ¶ 14.

[7] Non-employee related costs. Staff costs and NERC's are 100% of costs funded under the Basic Education Act. Salvi Decl. ¶ 11.

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forecast of costs to actual experience. If more funding is needed, supplemental appropriations are made by the Legislature to ensure full funding of those costs.

The statutes and the appropriations-allocations process described above have been fully funding the basic education program for almost 30 years. In that time, there have been only two challenges to its constitutional adequacy: *School Funding II*, decided twenty-five years ago, and this case. Clark Decl. ¶¶ 3, 14.

C. Washington Learns Initiated a Process of Basic Education Reform That Will Continue into the Next Funded Biennium.

As described above, *School Funding II* charged the State with the obligation to review and reform the program and funding of basic education. The studies mentioned in Petitioners' brief are part of the State's performance of that duty.

As explained in the Salvi Declaration, ¶¶ 18 through 22, Washington Learns was an entity created by the Governor and the Legislature to conduct a top to bottom review of Washington's entire education system, its structure, and its funding. It consisted of a Steering Committee and three advisory committees. The Steering Committee was charged with making policy recommendations to the Legislature and, as part of its comprehensive review, analyzed moving toward a world-class, learner-focused education system. It presented its recommendations to the Legislature on November 15, 2006.

Three advisory committees, the K-12 Education Advisory Committee, the Early Learning Council, and the Higher Education Advisory Committee, advised the Steering Committee. Business people, government officials, educators and several state legislators sat on the advisory committees, including representatives from a number of the constituents of petitioner, Network for Excellence in Washington Schools (NEWS). Funding for a new definition of basic education is one of the issues that was studied and debated. The services which might be provided included elements significantly beyond those required by the basic program of education as it is currently defined and fully funded. Salvi Decl. ¶ 21.

To continue the process of reform, the Legislature endorsed and has acted upon many of the recommendations contained in the Washington Learns' reports, including increased education funding by $1.8 billion. *Id.* ¶ 24. Legislation passed in 2007 also mandates that, by September 2008, the Governor and Legislature will have recommendations about steps to improve the program for basic education and the potential means of fully funding that program. The 2009 biennial funding sessions of the Legislature can then consider those recommendations and pass appropriate legislation.

To order what Petitioners demand--a formal cost study the State is then required to fund--would pre-empt the Legislature's chosen method for both defining and funding the basic program of education. Salvi Decl. ¶ 25. It would force the State to abandon the reform effort conducted for the last two years which, if uninterrupted by Petitioners, will continue the process of reform into 2008 and beyond. *Id.* It will be a tremendous waste of time and effort already invested by the State in favor of a different, complex and expensive process that would be impossible to accomplish in the short time (one year) demanded by Petitioners. *Id.* The State's experience with studies of how to reform the program which is its paramount duty indicates that a one-year deadline to complete such work is much too short. *Id.*

D. Other Evidence Controverts Petitioners' Claim That Washington Underfunds its Basic Education Program.

Petitioners cite to documents and testimony from which they argue the Court should infer the State's failure to fully fund a program of basic education. The facts discussed above contradict that evidence and inference.

The testimony of Dr. Eric Hanushek, a leading national expert on education funding and programs also contradicts Petitioners' evidence. His research confirms that Washington's students rank very high, when compared to student performance elsewhere on nationally credited tests. Hanushek Decl. ¶¶ 16-23. For example, the National Assessment of Education Progress ranks Washington eighth in mathematics. *Id.* The 2007 national "Education Report

Card" gave Washington an "A" in overall school achievement. *Id.* Washington ranked second in the academic achievement of low-income and minority students. *Id.* These results contradict any inference that WASL results demonstrate inadequate funding. Indeed, they confirm that Washington achieves better student outcomes than states that fund more. *Id.* ¶ 17.

Dr. Hanushek's testimony also undercuts the inference that inadequate funding is evidenced by alleged poor student performance. There is no proven, scientific connection between poor student performance and funding levels provided. *Id.* ¶ 15. Indeed, Dr. Hanushek has analyzed states where funding was ordered increased in the (erroneous) expectation that student outcomes would improve and concludes that Washington's experience and that of other states proves that "how" funds are spent is more important than "how much". *Id.* ¶¶ 15 and 26.

Superintendent Bergeson's deposition testimony also raises fact issues about Washington students' performance on testing and the process of funding by Washington. She confirms that Washington is in the top tier of student performance under the National Assessment of Education Progress. Clark Decl. Ex. 10, p. 43. She disputes the suggestion that Washington has fallen behind student performance in other states. *Id.*, p. 44, l. 10 to p. 45, l. 3. She testified that Washington student performance on WASL is continuing to improve (*id.*, p. 49, l. 10 to p. 50, l. 6) and that Washington is, in fact, preparing students to compete in today's world. *Id.* p. 56, ll. 9-23. Finally, she confirms that the Legislature has determined and fully funded the cost of its basic education program, thereby dispelling the need for the cost study demanded by Petitioners. *Id.*, p. 76, l. 13 to p. 77, l. 17.

Finally, the Salvi Declaration, ¶ 16, 20-21, controverts the claim that Washington Learns determined the State has underfunded basic education and the allegation that Washington depends on local government or private entities to supplement state funding.

E. This Case Requires Full Discovery and the Development of a Record Upon Which Constitutional Claims Can Be Decided.

This case is just over four months' old. The defense has issued a comprehensive set of discovery requests that will not produce results until after this Opposition is due. Clark Decl. ¶ 5. Even if Petitioners respond fully, defense counsel will require substantial time to review responses, follow-up with other written requests for discovery and conduct depositions. *Id.* The state of this case is far too undeveloped—as would be expected from the brief time that has passed since its filing. Petitioners admit they have conducted only limited discovery.

To respond to a motion for complete summary judgment, even the marginal one brought herein, will require specific discovery about Petitioners' use of, and reliance upon, the results of WASL testing and the February 2007 study conducted on behalf of the WEA (a member of Petitioner NEWS).[8] *Id.* ¶¶7-8. (The study, like the WASL results, appears to be Petitioners' primary indicators of underfunding.) The study will undoubtedly require rebuttal by both fact and expert witnesses. *Id.* Moreover, the makeup of the Petitioners, parents and their children and a recently formed non-profit organization, whose membership is likely to possess the information, documents and testimony needed, will make discovery cumbersome. *Id.* ¶ 9. Third-party discovery across Washington and in other states will have to be concluded before this case can be decided. *Id.* ¶ 8.

IV. QUESTIONS OF LAW PRESENTED

1. Should this Court define specific terms of Article IX of the state Constitution when the Supreme Court already has done so, holding that the Article's terms are fulfilled by the definition and funding of a program of basic education?

2. Is the Washington program of basic education defined and funded in the Basic Education Act and related state statutes that govern education goals and opportunities

[8] Proof contradicting the inference of underfunding is obviously material to the case. Ramerman Declaration, Exhibit K, is an attempt to offer evidence of underfunding and the defense is entitled to test that proposition.

(RCW 28A.150.210), basic education program requirements and their implementation (RCW 28A.150.220) and the funding of staff and non-staff costs of that basic education program (RCW 28A.150.250 and .260)?

3. Does the existence of genuine and material fact issues preclude summary judgment, particularly when, as here, Petitioners assert constitutional claims that require proof beyond a reasonable doubt.

4. Can the Court award Petitioners a remedy ordering the Legislature regarding the means and methods of fulfilling its constitutional duty?

5. Does Civil Rule 56(f) provide an alternative basis for denying this Motion to allow the State to conduct discovery?

6. Should the Court strike inadmissible exhibits and testimony as well as those sections of Petitioners' brief that are based on inadmissible evidence?

V. EVIDENCE RELIED UPON

Evidence relied on to defeat this Motion includes: the Declarations of Julie Salvi, Eric Hanushek and William G. Clark, and the documents and deposition testimony attached thereto and specifically cited *infra*.

VI. ARGUMENT

The Court should deny the Motion because: (1) the legal meaning and effect of Article IX has been established by the Supreme Court; (2) RCW 28A.150.210 constitutes a revised statement of goals and opportunities, not the substantive content of basic education; (3) substantial evidence precludes a ruling that the State underfunds its program of basic education; (4) the remedy demanded is unavailable as a matter of law; (5) the requested remedy would contravene Washington law, is contrary to recent court decisions in other states and has been proven ineffective; and (6) Petitioners' Motion is based upon inadmissible evidence.

A. Legal Standards Governing Summary Judgment and Constitutional Claims Require Denial of This Motion.

Civil Rule 56(c) mandates that Petitioners demonstrate there is no material fact issue and that they are entitled to judgment as a matter of law. The Court views all evidence and inferences favorable to the non-moving party; all doubts about the existence of factual issues are resolved in Respondent's favor. *Roger Crane & Associates v. Felice*, 74 Wn. App. 769, 875 P.2d 705 (1994). Summary judgment is appropriate only if, based on all evidence submitted, reasonable persons can reach but one conclusion. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 828 P.2d 549 (1992).

In addition to legal principles underlying every summary judgment motion, there is a greater burden on Petitioners in this case. Petitioners must overcome "the strong presumption of constitutionality" in legislative action and statutes and provide proof beyond a reasonable doubt[9] that whatever Petitioners claim is lacking from the program or its funding "are constitutional imperatives requiring immediate judicial intervention." *School Funding II*, Conc. of Law 15 (1983); *accord*, *Tunstall v. Bergeson*, 141 Wn.2d 201, 220, 5 P.3d 691 (2000):

> This "demanding standard of review" [proof beyond a reasonable doubt] is justified because, as a co-equal branch of government that is sworn to uphold the constitution, we assume the Legislature considered the constitutionality of its enactments and afford great deference to its judgment. Additionally, the Legislature speaks for the people and we are hesitant to strike a duly enacted statute unless fully convinced...that the statute violates the constitution.

The elevated quantum of proof makes it more difficult to obtain summary judgment. "[T]he judge must view the evidence presented through the prism of the substantive evidentiary burden." *Adams v. Allen*, 56 Wn. App. 383, 393, 783 P.2d 635 (1989). Even if

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[9] The quantum of proof relates to more than what facts are proven; the standard is met only if "argument and research show that there is no reasonable doubt that the statute violates the constitution." *Amunrud v. Bd. of Appeals*, 158 Wn.2d 208, 215, 13 P.3d 571 (2006); *Larson v. Seattle Popular Monorail Auth.*, 156 Wn.2d 752, 757, 13 P.3d 892 (2006).

there are no factual disputes, the moving party may still not meet the substantive requirements inherent in its claim because of the burden of proof. *See Sedwick v. Gwinn*, 73 Wn. App. 879, 873 P.2d 528 (1994).

Moreover, Petitioners present a constitutional challenge to state legislation.[10] One way to do so is a "facial" challenge, requiring Petitioners to prove that there are "no set of circumstances" where the basic education program, funding or appropriations statutes can be constitutionally applied. *Wash. State Republican Party v. Wash. State Public Disclosure Comm'n*, 1414 Wn.2d 245, 282, n.14, 4 P.3d 808 (2000); *Tunstall*, 141 Wn.2d 220-21. If not a facial challenge, Petitioners must prove that these statutes are unconstitutional "as applied" in the specific factual context alleged. *Id.*

Finally, Petitioners' burden is insurmountable because the Legislature is pursuing comprehensive education reform through Washington Learns and 2007 legislation.

> The Petitioners' burden is not met, for example, where the State represents to the Court that a particular program is still under consideration by the Legislature and that a decision will be made promptly, or where the State represents that a particular problem will be dealt with or a particular program fully funded in a prompt manner.

School Funding II, Conc. of Law 16 (1983).

B. The Supreme Court Already Has Determined the Legal Effect of Article IX.

Petitioners' first requested ruling is for adoption of the dictionary definition of the terms "paramount", "ample" and "all". The Court need not do so as all these terms have been defined by the Supreme Court. Paramount and ample were specifically defined in *Seattle Sch. Dist. v. State*. "All children" was the subject matter of *Tunstall v. Bergeson*, 141 Wn.2d at

[10] In *School Funding I*, 90 Wn.2d at 528, the Court applied the "normal civil burden of proof" rather than "the highest burden of proof." This would appear in conflict with the Supreme Court cases holding that proof beyond a reasonable doubt was necessary to declare legislative actions or statutes concerning education unconstitutional. *E.g., Tunstall, supra*, 141 Wn.2d at 220. Petitioners clearly are attacking either or both the education program or funding statutes. Moreover, as Judge McPhee ruled in *School Funding IV*, preponderance governs the resolution of civil evidentiary issues while, even if that evidence establishes facts supporting Petitioners' claims, the Court still must be convinced that there is no reasonable doubt of unconstitutionality. Conclusion of Law No. 3, *infra* at p. 5.

220 (the State is not obligated to provide an identical education to all children in the State regardless of the circumstances in which they are found).

In fact, our Supreme Court has construed the legal effect of the entire passage of Article IX, § 1 where these terms appear. The duty imposed on the State by this provision is simply to define and fully fund a program of basic education. *Seattle School District*, 90 Wn.2d at 520; *School Funding II*, Conc. of Law 6. In assessing the fulfillment of that duty, this Court should bear in mind that the State provides "opportunities", not guaranteed outcomes, for education. As stated by Judge Talmadge in a concurring opinion:

> The Washington Constitution effectively offers children in this state a constitutional right to *educational opportunity*. The state has the paramount duty to make ample provision for this opportunity in the education of its children. The Legislature's paramount duty is to define this educational opportunity in the establishment of an educational system and to fund it. Individual children, their parents, and local school districts each have standing to compel the Legislature to implement this constitutional mandate. But the courts cannot prescribe an individual right to a specific form of education.

Tunstall v. Bergeson, 141 Wn.2d at 236.

A ruling defining terms is superfluous in light of the above decisions.

C. RCW 28A.150.210[11] Does Not Define Substantive Content for Basic Education.

In an effort to bolster their contention that WASL results prove unconstitutional underfunding, Petitioners mischaracterize the origins, content and significance of RCW 28A.150.210. First, the statute was not passed, or referred to, as the Basic Education Act of 1993. Clark Decl. Ex. 10, p. 22, ll. 12-25. Nor was it enacted pursuant to *School Funding I*: a predecessor statement of "goals" had existed since 1977 when the Basic Education Act was passed. Section .210 was an amendment of that provision. (*Infra* at pp. 6-7).

Contrary to Petitioners' contention, this statute does not define the content of basic education. It is not a guarantee of student achievement or success. In language left out of

[11] The 2007 legislative session has amended .210 to replace the statement of goals. Ex. 11 to Clark Decl. Though Petitioners' Motion thus addresses a superseded statute, the new provision is substantially the same.

Petitioners' quote, .210 explicitly provides that "opportunities" to become educated are what school districts are expected to offer. Creating opportunities, not prescribing educational content, is the expressed legislative intent behind this statute.

Finally, this statute cannot be exalted over, or removed from the context of, the balance of RCW 28A.150. Program requirements and funding are addressed in .220, .250 and .260. The Court should reject the ruling requested as to .210.

D. Substantial Issues of Material Fact Preclude Summary Judgment Regarding Constitutional Compliance.

Petitioners' evidence consists of general statements made historically, recent deposition testimony, and allegedly deficient student test results in the WASL. Taken as a whole, this evidence, even if undisputed, does not prove beyond a reasonable doubt that the State has violated its duty under Article IX.

Statements that the State should "do more" or "is not doing enough" or "the system is failing our children" are not proof beyond a reasonable doubt of underfunding. Testimony that funding is not "ample"[12] cannot overcome the presumed validity of a statute that declares that implementation of the program and the funding formulae in RCW 28A.150, .250 and .260 shall constitute "full funding". The Salvi Declaration confirms that the State has implemented both the program and funding that, by law, is full funding of a basic education program.

Petitioners' evidence is also fatally defective due to the lack of a proven connection between unsatisfactory student achievement on the WASL and inadequate state funding. Petitioners have produced no witness, expert or fact or document, that establishes this link.

[12] Petitioners cite deposition testimony about whether "ample" funds are provide for educating high school students and a quote from a Seattle newspaper attributed to Governor Gregoire. Even if there was a foundation to regard these as admissions—and there is none because neither the Superintendent nor the Governor are parties to the case—such statements are not deemed binding or conclusive on an issue. *Hurst v. Wash. Canners Co-Op*, 50 Wn.2d 729, 733-34, 314 P.2d 651 (1957). This is true even if a witness is produced as a spokesperson on an issue pursuant to CR 30(b)(6). *Casper v. Esteb Enterprises, Inc.*, 119 Wn. App. 759, 767, 82 P.3d 1223 (2004). No such depositions have been taken.

Without proof of such a connection, there is no justification, in fact or law, for a conclusions that funding is constitutionally deficient.

The defense has brought forth specific facts that contest Petitioners' evidence. The Basic Education Act itself declares that implementation of its statutory program and funding of the costs of basic education is "full funding". RCW 28A.150.250. These statutes are followed each biennium to fund the actual costs of the basic education program. Salvi Decl. ¶¶ 5-8. Superintendant Bergeson[13] and Dr. Hanushek testified that student test performance levels in Washington are superior to those in the majority of other states—including several that spend more and get less in outcomes for students. Clark Decl. Ex. 10, p. 43; Hanushek Decl. ¶ 17. Finally, the defense testimony about Washington Learns shows that it is a reform initiative to explore taking education in Washington to a different level –beyond the basic education program currently in place. Salvi Decl. ¶¶ 20-21. It is not an indictment of Washington's performance of constitutional obligations, as claimed by Petitioners.

Finally, Petitioners erroneously contend that the State does not fund school construction. RCW 28A.150.270 provides that funds for this purpose can come out of the basic education allocation. School construction projects also are state-funded as part of the Biennial Capital Appropriations Acts. Salvi Decl. ¶ 14.

E. The Remedy Requested Is Unavailable Under Washington Law.

At the close of their brief, Petitioners make the cavalier and unsupported argument that this Court should avoid a protracted litigation process and order the State to implement the remedy prayed for in the Petition: a cost study for basic education and a plan for how the State will fund it. (Opening Brief, p. 21). Petitioners erroneously call this remedy

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[13] Petitioners caution that a party cannot create issues of fact with an affidavit that contradicts the party's deposition testimony. This only applies to contradictory testimony by the same person. *McCormick v. Lake Wash. School Dist.*, 99 Wn. App. 107, 992 P.2d 511 (1992). It does not preclude evidence from other sources that supports the allegedly inconsistent testimony of a witness. *Sedwick v. Gwinn, supra*, 73 Wn. App. At 888. Even if the same person provides contradictory statements, one is rejected in favor of the other only if there is a clear and material contradiction. *Sun Mountain Productions, Inc. v. Pierre*, 84 Wn. App. 608, 929 P.2d 494 (1997).

"conservative and narrowly tailored" and make the wholly-unsubstantiated claim that such an approach has been the approach in other cases across the nation.

Petitioners' preferred remedy exemplifies the fundamental flaw in their entire Motion. They would dispense with discovery, avoid trial on the merits through a summary process based on a woefully undeveloped record and embark the State on a course that is designed to be costly, that will preempt the Legislature's chosen means of reform and that has no demonstrable likelihood of improving outcomes for Washington's students.

Petitioners' preemptive remedy is bad law: in Washington, the Legislature has the right to devise and implement the methods and means by which it discharges its Article IX responsibilities. *McGowan v. State*, 148 Wn.2d 278, 293, 60 P.3d 67 (2002); *Tunstall v. Bergeson*, 141 Wn.2d 201, 223, 5 P.3d 691 (2000); *Seattle School District v. State*, 90 Wn.2d 476, 519-20 (1978).

Petitioners' preemptive remedy is bad science: expert analysis of experience nationwide demonstrates that increased funding does not produce better outcomes for students. Hanushek Decl. ¶¶ 15, 17 and 26. Moreover, there is no demonstrable connection between poor student test performances and allegedly inadequate funding.[14] *Id.*

Petitioners' preemptive remedy has not worked in other states. *Id.* Indeed, the recent decisions of the highest courts in other states show the trend is for courts to defer to the other branches of government to define and implement education programs, funding and reform. Clark Decl. ¶ 13. For example, in one case cited by Petitioners, New York's Court of Appeals reversed the trial court's order that a cost study's conclusion about adequate funding be substituted for the legislature's reasonable determination of what those costs were, and how to fund them:

[14] Dr. Hanushek notes that this was particularly true in New Jersey, where litigation has been ongoing for 30 years. Hanushek Decl., ¶ 26.

> The role of the courts is not, as the Supreme Court assumed, to determine the best way to calculate the cost of a sound basic education in New York City schools, but to determine whether the State's proposed calculation of that cost is rational.

Campaign for Fiscal Equity, Inc. v. State, 8 N.Y.3d 14, 27 (2006). (Clark Decl. Ex. 6)

The national trend has been to dismiss constitutional claims that the state underfunds education because the other branches of government have both the responsibility and the right to make education policy and funding decisions. *See, e.g., Young v. Williams*, _____ Ky. _____ (February 13, 2007); *Oklahoma Education Ass'n v. State*, 2007 Okla. 30 (May 8, 2007); *Nebraska Coalition for Educational Equity v. Heineman*, 273 Nebr. 531 (May 11, 2007). (Clark Decl. Exs. 7, 8 and 9)

Finally, the requested remedy is tantamount to issuing a writ of mandamus or a mandatory injunction. Petitioners have not briefed their entitlement to such extraordinary relief. Nor do they qualify for it under appropriate authorities. *See, e.g., Eugster v. City of Spokane*, 118 Wn.2d 383, 76 P.2d 741 (2003) (writs of mandamus) and *San Juan County v. No New Gas Tax*, 2007 WL 1218207 (2007) (preliminary injunction).

F. Civil Rule 56(f) Also Mandates Denial of the Motion to Permit Full Discovery on Material Issues.

An alternative basis for denying summary judgment is CR 56(f). Under that rule, the court refuses or continues the motion to permit sufficient time to take depositions or to conduct discovery. *Butler v. Joy*, 116 Wn. App. 291, 299, 65 P.3d 671 (2003). The court's primary consideration is justice, *id.* at 675, and the modern trend under CR 56(f) is to apply court rules to allow cases to be decided on their merits. *Weeks v. Chief of Wash. State Patrol*, 96 Wn.2d 893, 895-96, 639 P.2d 732 (1982).

To justify denial or continuance under CR 56(f), the State only need show: (1) a good reason for any delay in obtaining evidence; (2) an indication of what evidence would be established; and (3) that the evidence will raise a genuine issue of fact. *Coggle v. Snow*, 56

Wn. App. 499, 5080, 784 P.2d 544 (1990). As shown in the Clark Declaration, ¶¶ 3 through 10, all factors are present in this case.

First, there has been no delay in pursuing discovery. The case was started only four months ago. The State has propounded comprehensive discovery requests that are unanswered as of the time of filing this Opposition. The state has deferred taking depositions until it has had the opportunity to assess the adequacy and substance of Petitioners' responses to written discovery. The cutoff of discovery is nearly one year way: May12, 2008.

The discovery outstanding includes requests that Petitioners substantiate the allegations that the State fails to fund basic education in compliance with Article IX. (Clark Decl. Ex. 4) Their anticipated responses should include documents that relate to their (yet unproven) contention that WASL test results are due to inadequate State funding. Indeed, as one of Petitioners' constituent members has repeatedly indicated, the WEA opposes "using the WASL test to make high stakes decisions about students and schools." *Id.* Ex. 5. How can Petitioners claim that WASL test results decide the adequacy of State funding, but are useless for all other "high stakes" decisions about students and schools? Allowing discovery will permit the defense to test the credibility of reliance on WASL test results to establish liability.

Another area of needed discovery concerns the WEA-sponsored study, published in February 2007 and relied upon by Petitioners to support their Motion (Opening Brief, p. 7, n.8 and p. 21, n.42). This study was done by a non-party, out-of-state consultant, which means that time-consuming, third-party discovery of this outfit will have to occur before the State has a chance to evaluate and rebut this potential evidence. Moreover, an expert will have to analyze and rebut this voluminous work. That will take many months to accomplish.

The third requirement—that the discovered evidence is material—is satisfied because the two examples provided above address Petitioners' claim that basic education is

underfunded and, more specifically, their assumption that poor student performance on the WASL is proof of underfunding.

Finally, fully dispositive motions in this case of paramount public interest should be deferred until the close of discovery. The factual and legal issues are too complex to be decided on an incomplete record that typically accompanies summary disposition of entire cases.

G. The Court Should Strike Petitioners' Inadmissible Evidence.

Petitioners are obliged to support their case based on admissible evidence from competent sources. *McKee v. Am. Home Products Corp.*, 113 Wn.2d 701, 706, 782 P.2d 1045 (1989). Affidavits offered in support of summary judgment must conform to what the affiant would be permitted to testify at trial. *Blomster v. Nordstrom, Inc.*, 103 Wn. App. 252, 11 P.3d 883 (2000). Inadmissible portions of affidavits are disregarded. *Wash. Public Utility Districts v. PUD No. 1 of Clallam Cy.*, 112 Wn.2d 1, 17, 771 P.2d 701 (1989).

Respondent moves to strike Exhibits K and O of the Ramsey Ramerman Declaration and ¶4 of the Edmund Robb Declaration because neither affiant is competent to testify regarding the authenticity or admissibility of the documents in question. An attorney, Mr. Robb has no foundation or basis to testify about the substance, meaning and effect of documents he neither prepared, assisted in preparing and which concern a subject matter (education funding) that he has no demonstrated expertise in. *See Wilson v. Steinbach*, 98 Wn.2d 434, 438-39, 656 P.2d 1030 (1982).

Exhibits K and O to the Ramerman Declaration are a newspaper article (purporting to quote Governor Gregoire) and the WEA consultants' study. Mr. Ramerman authored neither document. He has no first-hand knowledge of their creation or contents. Both are also hearsay; in fact, both contain multiple layers of hearsay. ER 805. Similarly, the defense moves to strike the excerpted remarks of former Governors as hearsay and so remote in time